Albert Phalen

Phalen's Criminal cases

Volume 1

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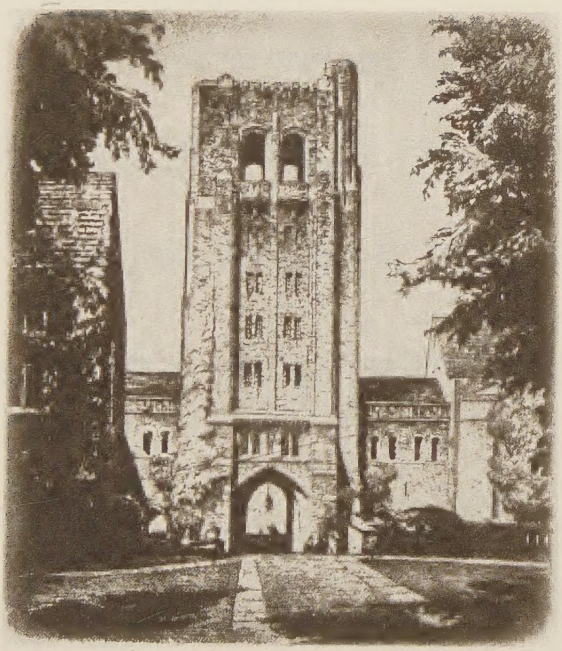

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PHALEN'S CRIMINAL CASES:

BEING

A SELECTION OF AUTHORITIES

UPON THE SUBJECTS OF

EMBEZZLEMENT, FALSE PRETENSES,

LARCENY, ROBBERY, ETC.,

WITH COMMENTS, NOTES AND REFERENCES.

VOL. 1.

By ALBERT PHALEN,

ATTORNEY AT LAW.

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EMBEZZLEMENT.

The common law definition of larceny, as construed by the English courts, did not extend to all cases in which the property of one was taken and fraudulently converted to his own use by another. The offence was strictly defined, and from the earliest time it had been held that the non-consent of the owner of goods to the taking thereof was an indispensable ingredient in making up the crime of larceny. *a*

Where the possession of goods was acquired *bona fide* by a bailee, no subsequent fraudulent conversion by him amounted to larceny at common law unless there was breaking of bulk, or some other rupture of the condition of bailment amounting to trespass. *b*

Neither was it larceny at common law for a servant to embezzle, or fraudulently convert to his own use goods delivered into his possession by his master, to keep for the use of the master. But where a servant had merely the custody of the goods, then a felonious appropriation thereof was larceny at common law, though the custody came directly from the master or employer. *c*

At the common law no delivery of goods from the owner to the offender upon trust, could ground a larceny. As if A. loaned B. a horse, and he rode away with it; or if I sent goods by a carrier and he carried them away; these were not larcenies. But if the carrier opened a bale or package of

a R. v. Bazely, 14; Kribs v. People, 18; Simco v. State, 20; People v. Hennessey, 99; People v. Loomis, 171; Reg. v. Middleteton, 189; Kellogg v. State, 384.

b R. v. Bazely, 14; Simco v. State, 20; Com. v. Berry, 109; Warmouth v. Com., 142; People v. Nichols, 183.

c R. v. Watson, 13; Com. v. Berry, 109; Warmouth v. Com., 142; R. v. Lavandar, 181; R. v. Paradice, 182.

goods, or pierced a vessel of wine, and took away part thereof, or if he carried it to the place of delivery, and afterward took away the whole, or a part thereof, these were larcenies; for there the *animus furandi* is manifest, since in the first case he had otherwise no inducement to open the goods, and in the second the trust was terminated, the delivery having taken its effect. Neither by the common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But if he had not the possession, but only the care and oversight of the goods, as the butler of the place, the shepherd of the sheep, and the like, the embezzlement of them was felony at common law. So if a guest robbed his inn or tavern of a piece of plate, it was larceny; for he had not the possession delivered to him, but merely the use. 4 Blk. Com., 230, 231.

"If a man deliver goods to a carrier to carry to a certain place, and he carry them away, it is no felony; otherwise, if he had a bale or trunk with goods delivered to him, and he break the bale or trunk, and take and carry away the goods with intent to steal them. So if he carry the whole pack to the place appointed, and then carry it away with intent to steal it, this is a felonious taking by the book of 13 Ed. 4, 9, for the delivery had taken effect, and the privity of the bailment was determined. But that must be, indeed, says Lord Hale, where *he carries them to the place, and delivers or lays them down;* for then his possession by the first delivery is determined, and the taking afterwards is a new taking.

"It appears at first sight absurd to say, that if the carrier never carry the package to the place appointed, but sell the whole, it shall not be felony; but that if he take out a part of the goods only, it shall be so. Yet the distinction is well settled; for the carrier is trusted with the carriage of it in that condition; and if the package be lost, stolen, or taken, he is answerable; and therefore his conversion is a breach of trust for which the owner may recover the value of the whole in damages. But to constitute larceny there must be an unlawful taking and trespass; and up to the moment of his parting with the whole package, his possession is lawful, and he has no unlawful possession afterwards whereby to consti-

tute a new taking, unless he break the package, or sever part of the commodity from the rest while it continues in his possession." 2d. East's P. C., 659.

"If the person to whom goods are delivered has but the bare charge or custody of them, the legal possession remains in the owner, and the other may commit larceny by a fraudulent convertion of them to his own use. This rule I have before shown *d* to hold most expressly in the case of servants entrusted with the care of goods in the possession of their masters. The only doubt which had any foundation in respect to such persons was where the master had no previous possession of the property distinct from the actual possession of the servant; but that difficulty has been removed by the stat., 39 Geo., 3 C., 85.*e* The same rule applies to him who has a bare special use of goods; as in the case of a guest in the owner's house; for none of these persons have, properly speaking, the possession. So, if a weaver or silk throwster deliver yarn or silk to be wrought by journeymen in his house, and they carry it away with the intent to steal it, it is felony; for the entire property remains there only in the owner, and the possession of the workman is the possession of the owner. But if the yarn had been delivered to a weaver out of the house, and he having the lawful possession of it had afterward embezzled it, this would not be felony; because by the delivery he had a special property, and not a bare charge; in the same manner as one who is entrusted with the care of a thing for another to keep for his use." 2 East's, P. C., 682.

In view of these defects and uncertainties in the common law, and to prevent servants from embezzling or converting to their own use, with intent to steal, caskets, jewels, money, goods or chattels, delivered to them by their masters or mistresses to keep, the English parliament passed the following enactment, 21 Henry VIII. C. 7, which recites that: "WHERE before this time, divers, as well noblemen as others the king's subjects, have upon confidence and trust delivered unto their servants, their caskets and other jewels, money, goods, and chattels, safely to be kept to the use of their said masters or mistresses, and after such delivery the said servants have with-

d Paradice's Case, post. *e* 39 Geo., 3 c., 85, Post.

drawn themselves and gone away from their said masters or mistresses, with the said caskets, jewels, money, goods and chattels, or part thereof, to the intent to steal the same, and defraud their said masters or mistresses, have converted the said jewels, money and other chattels, or parts thereof, to their own use, which misbehavior so done was doubtful in the common law, whether it were felony or not; and by reason thereof, the aforesaid servants have been in great boldness to commit such or like offences: Be it therefore enacted, ordained and established by the King our Sovereign Lord, by the assent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by authority of the same, That all and singular such servants (1), to whom any such casket, jewels, money, goods or chattels, by his or their said masters or mistresses (2), shall from henceforth so be delivered to keep (3), that if any such servant or servants withdraw him or them from their said masters or mistresses and go away with the said caskets, jewels, money, goods or chattels, or any part thereof, to the intent to steal the same, and defraud his or their said masters or mistresses thereof, contrary to the trust and confidence to him or them put by his or their said masters or mistresses, or else being in the service of his said master or mistress, without assent or commandment of his master or mistress, embezzle the same caskets, jewels, money, goods, or chattels, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal it, that if the said caskets, jewels, money, goods or chattels, that any such servants shall so go away with, or which he shall embezle with purpose to steal it, as is aforesaid, be of the value of XI s. or above, that then the same false, fraudulent, and untrue act or demeanor, from henceforth shall be deemed and adjudged felony; and he or they so offending, to be punished, as other felons be punished for felonies committed by the course of the common law.

II. "Provided always, that this act, or any thing therein contained, shall not in anywise extend, or be prejudicial to any apprentice or apprentices, nor to any person within the age of eighteen years, going away with his or their masters goods or jewels, or otherwise converting the same to his or their

own use, during the time of their apprenticeship, or being within the age of eighteen years, but that every apprentice or apprentices, such person or persons being within the said age, doing or offending contrary to this present Act, shall be, and stand in like case as they and every one of them were before the making of this Act; the same Act to continue and endure unto the next Parliament."

While the above statute, made the offence of embezzling property delivered by the *master*, felony; the property of others was not expressly embraced and it was held in Bazely's case,[1] that where a banker's clerk received money and notes paid in by a customer, and embezzled the notes, that the offence was not larceny but only a breach of trust, the master never having possession distinct from the servant.

This construction brought forth the statute 39 George III. C. 85, which recites and enacts that:

"WHEREAS bankers, merchants, and others, are, in the course of their dealings and transactions, frequently obliged to entrust their servants, clerks and persons employed by them in the like capacity, with receiving, paying, negotiating, exchanging, or transferring money, goods, bonds, bills, notes, bankers' drafts, and other valuable effects and securities. And whereas doubts have been entertained whether the embezzling of the same by such servants, clerks, and others, so employed by their masters, amounts to felony by the law of *England*, and it is expedient that such offences should be punished in the same manner in both parts of the United Kingdom; be it enacted and declared by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That if any servant or clerk; or any person employed for the purpose in the capacity of a servant or clerk, to any person or persons whosoever, or to any body corporate or politic, shall, by virtue of such employment, receive or take into his possession any money, goods, bond, bill, note, bankers' draft, or other valuable security, or effects, for or in the name or on the account of his master or masters, or employer

[1] Bazely's case, post.

or employers, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or employers, for whose use, or in whose name or names, or on whose account the same was or were delivered to, or taken into the possession (1) of such servant, clerk or other person so employed, although such money, goods, bonds, bills, notes, bankers' draft, or other valuable security, was or were not otherwise received into the possession of his or their servant, clerk, or other person so employed; and every such offender, his adviser, procurer, aider or abetter, being thereof lawfully convicted or attainted, shall be liable to be transported to such parts beyond the seas as his Majesty, by and with the advice of his Privy Council, shall appoint, for any term not exceeding fourteen years, in the discretion of the Court before whom such offender shall be convicted or adjudged."

The next statute upon the subject of embezzlement is, the 7 and 8 George IV. C. 29, entitled "An Act for consolidating and amending the laws in *England* relating to Larceny and other offences connected therewith. Section 47. "And, for the punishment of embezzlements committed by clerks and servants, be it declared and enacted: That if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall by virtue of such employment, receive or take into his possession any chattel, money or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel money or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant or other person so employed; and every such offender, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

SECTION 48. "And, for preventing the difficulties that have been experienced in the prosecution of the last mentioned offenders, be it enacted, That it shall be lawful to charge in

the indictment and proceed against the offender for any number of distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts; and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly.

SECTION 49. "And, for the punishment of embezzlements committed by agents entrusted with property, be it enacted, That if any money, or security for the payment of money, shall be entrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money, or any part thereof, or the proceeds or any part of the proceeds of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in anywise convert to his own use or benefit such money security or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and if any chattel or valuable security or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of *Great Britain* or *Ireland*, or of any foreign state, or in any fund of any body, corporate company or society, shall be entrusted

to any banker, merchant, broker, attorney or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith and contrary to the object or purpose for which such chattel security or power of attorney shall have been entrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or funds to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the descretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned.

SECTION 50. "Provided always, and be it enacted, That nothing hereinbefore contained relating to agents shall affect any trustee in or under any instrument whatever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney or other agent from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this Act had not been passed; nor from selling, transferring or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim or demand, entitling him by law so to do, unless such sale, transfer or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim or demand.

SECTION 51. "And be it enacted, That if any factor or agent entrusted, for the purpose of sale, with any goods or merchandise, or entrusted with any bill of lading, warehouse keeper's or wharfinger's certificate, or warrant or order for delivery of goods or merchandise, shall for his own benefit and in violation of good faith, deposit or pledge any such goods or merchandize, or any of said documents, as a security for any money or negotiable instrument borrowed or received by such factor

or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas, for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; but no such factor or agent shall be liable to any prosecution for depositing or pledging such goods or merchandize, or any of the said documents, in case the same shall not be made as security for or subject to the payment of any greater sum of money than the amount which, at the time of such deposit or pledge, was justly due and owing to such factor or agent from his principal, together with the amount of any bill or bills of exchange drawn by or on account of such principal, and accepted by such factor or agent."

The 9 George IV. C. 55 entitled "An Act for consolidating and amending the Laws in Ireland, relative to Larceny, and other offences connected therewith," and recites that Whereas in the last session of Parliament an Act was passed for consolidating and amending the laws in *England* relative to larceny, and other offences connected therewith; and it is expedient that provision should be made in *Ireland* for the like purposes. Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, that this present Act, and the several matters herein contained, shall extend to *Ireland*, and not to *England*, *Wales or Scotland*, except in the two cases hereinafter specially provided for; and that this Act shall commence and take effect in *Ireland* on the first day of *September*, one thousand eight hundred and twenty-eight."

SECTION 40. "And for the punishment of embezzlement committed by clerks and servants, be it enacted. That if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattels, moneys or valuable security, for or in the name or on the

account of his master or employer, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant or other person so employed; and every such offender, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice or thrice publicly or privately whipped, (if the court shall so think fit), in addition to such imprisonment."

SECTIONS 41, 42, and 43 of this Act are identical with sections 48, 49 and 50 of the 7 and 8 Geo., IV, Chapter 29.

SECTION 75, provides that any person offending against the provisions of this act who shall afterwards have the same property in his possession in any part of the United Kingdom, may be tried and punished, under this act, in that part of the United Kingdom where he shall have such property, in the same manner as if he had actually stolen or unlawfully taken it as aforesaid in that part of the United Kingdom.

The 24 and 25 Victoria, C., 96, Sec. 68, provides that, "Whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered to, or received or taken into possession by him, for, or in the name or on account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed."

Some difficulties have been experienced both in this country and England, in the application of the embezzlement statutes. These difficulties arise mainly in failing to keep in view the distinguishing features between the offence of larceny and that of embezzlement and in the different construction courts have placed upon the same or similar statutes upon this subject.

Whether the embezzlement statutes are simply supplementary to the common law, and consequently confined to that class of cases not included within the common law range of larcenies, or whether they extend to and include within their embrace, facts which constitute larceny at common law, has been the source of much controversy, and is far from being a settled question in the American courts at the present time.*f*

Where the embezzlement statutes have been considered as merely supplementary to common law larceny, their application has been confined to such fraudulent appropriations by agents, clerks and servants as were not reached by common law prosecutions for larceny. This is the settled doctrine of the English courts, and seems to be supported by reason as well as authority; since a count for larceny and embezzlement may be joined in the indictment, and when the facts are developed by evidence, the prosecution may elect upon which count it desires to stand, or upon proper instructions may go to the jury upon both counts, it is hard to understand how the slightest inconvenience can arise from the maintenance of this rule. Otherwise, if the embezzlement statutes cover all classes of larceny by servants, the old common law indictment for larceny will not be good where servants are defendants, for the reason that the embezzlement statutes would have to be followed, and in indictments for embezzlement it is necessary to allege all such facts and circumstances as constitute the statute offence, so as to bring the party indicted precisely within the provisions of the statute creating the offence. All that would be necessary in a prosecution for larceny, to obtain an acquittal, would be to prove that the defendant was a clerk, servant, agent or bailee.*g*

f Ker v. People, post; Lowenthal v. State, post; People v. Dalton; Com. v. Berry, post; People v. Hennessy, post; State v. Sims, post.

g Murphy v. People; People v. Allen, post; Carter v. State, post;

But where the embezzlement statutes are considered as independent acts, creating a new class of offences, although the subject matter or a part thereof may have been larceny at common law, they will be viewed as other penal statutes and subject to the same rule of construction, and upon trial of the accused the inquiry will be, was the act done within the terms of the statute.*h*

Wharton in his Work on Criminal Law, Sec. 1905 (7 ed.), says: "In the common law definition of larceny existed two gaps through which, in the expansion of business, many criminals escaped. The first of these is caused by the position that to maintain larceny it is necessary that the stolen goods should have been at some time in the prosecutor's possession. The second results from the assumption that when possession of goods is acquired *bona fide* by a bailee, no subsequent fraudulent conversion, unless there be breaking of bulk or some other rupture of the condition of bailment, can be larceny while the bailment lasts. To cure these defects were passed the embezzlement statutes of England and of most of the United States. These statutes were intended simply to establish two new cases of larceny. If a servant (and this is the first of the two), steals his master's goods before they have arrived into his master's possession he, the servant, shall be guilty of larceny. And the second is, that it shall be larceny for a trustee, or bailee to fraudulently convert to his own use his master's goods he may have *bona fide* received. Now, as neither of these cases are larceny at common law, the statute of embezzlement in no way overlaps the old domain of larceny. They were passed solely and exclusively to provide for cases which larceny at common law did not include. Hence nothing that is larceny at common law is larceny under the embezzlement statute; and nothing that is larceny under the embezzlement statute is larceny at common law."

Gaddy v. State, post; Ker v. People, post; Kribs v. People, post; State v. Sims, post; Com. v. Berry, post.

h Lowenthall v. State, post; People v. Cohen, post; Ker v People, post; People v. Sherman, post; State v. Foster, post.

R. v. Watson.

(2 East's. P. C., 562.)

Embezzlement. No larceny in servant who embezzles money delivered to him to purchase goods with, either on the statute 27 Hery, 8 C. 7, or at common law.

William Watson was tried on an indictment, containing three counts; the first stating, that the prisoner as a servant, received £3 18s. the money of E. Cowper his late master; which was delivered to him safely to keep to the use of his said master; and that afterwards the said prisoner withdrew himself from his master with the money, with an intent to steal the same, and to defraud his said master thereof. The 2d count stated that the prisoner having received the said money in the manner above stated, and being with his master, had converted the same to his own use; and both concluded against the form of the statute. The third court was for larceny generally. It appeared that Cowper, who was a surrogate, had sent the prisoner, who was his servant, to buy some blank licenses, and had delivered him the £3 18s. for that purpose; but the prisoner ran away with the money; and being convicted, a question was reserved for the opinion of the Judges, whether the evidence supported any of the counts? and in East term, 1788, all the Judges but the Chief Baron held that this case was not within the Stat., for to *keep* means to keep for the use of the master, and to return to him. As to the count for larceny, all the Judges held this could not be felony at common law; for to make it felony there must be some act done by the prisoner, a fraudulent obtaining of the possession with intent to steal. The last point, however, has been since denied to be law in Lavender's case.

Lavender's case, post.

R. v. BAZELY.

(2 East's P. C., 571.)

EMBEZZLEMENT. Where a clerk in a banker's shop received money and notes paid in by a customer on his account, and the clerk placed the money in the till, but embezzled the notes immediately; held no larceny, but only breach of trust at common law; for though the possession of the servant is for many purposes and as against third persons the possession of the master, yet here the master never had a possession distinct from the servant as against him; and his receipt being lawful, there was no tortious taking by him, without which there can be no larceny. Aliter if he had taken the notes after he had deposited them in the till.

Joseph Bazely was tried at the O. B. in February, 1799, on an indictment for stealing a bank note of the value of £100, the property of Peter Esdaile and others, bankers in London. It appeared in evidence, that Mr. Gilbert, who kept cash with these gentlemen, sent by his servant £122 in bank notes and £15 in money, and amongst the bank notes was the note in question: That the servant delivered the whole into the hands of the prisoner, who was a clerk to the bankers, *and as such, authorized to receive and give a discharge for the same;* and that it was his duty to put the money received into a till, and to place in another drawer the several bank notes which he might receive during the day, for the purpose of another clerk taking down and entering in a book the particular description of each note. The prisoner gave an acknowledgement to the servant of having received the full sum of £137, and put the money into the till; but instead of placing the remaining sum of £122 which he received in bank notes in the drawer, according to his duty, he kept back the one of £100, for which he was indicted; and only delivered over those to the amount of £22. The jury found the prisoner guilty, subject to the opinion of the Judges. Whether such taking were to be considered as felonious, or only a breach of trust? The cause was argued in the Exchequer Chamber, in Easter term, 39 Geo. 3, before all the Judges, except Ashhurst, Buller and Heath Js., who were absent. The arguments are in print, and therefore I shall not detail them at length in this

place. It is sufficient to observe, that on the part of the prisoner it was contended to be a breach of trust, and not felony. And these distinctions were taken; that larceny is the taking of property from the possession of another without his consent and against his will. Breach of trust, the misapplication of property which another, by his own voluntary consent, has put into the possession of the party, and that fraud was (in this respect) the obtaining the possession of the property of another with his consent, by some contrivance against which common prudence cannot guard. That in order to constitute larceny the owner of the property must be in possession of it either actually or constructively. That here there was no actual possession, nor any constructive possession as against the prisoner. In the course of the argument it was stated and admitted that the prisoner had given his employers security to account for what he received, and against embezzlement. And on the part of the prisoner this was likened to a case of one Bull, who was indicted for receiving his master's money. The prosecutor was a pastry-cook, and having occasion to suspect he was robbed by the prisoner, who was his servant attending his shop, he employed a customer to come to his shop, on pretence of buying something; and for this purpose he gave him some marked shillings of his own, with which the customer came to the shop in the absence of the owner, and bought goods of the defendant. Soon after the master coming in, examined the till, where the defendant ought to have deposited the money when received, and not finding all the marked money there, he procured the defendant to be immediately apprehended and searched, and the rest of the marked money was found upon him. After conviction the point was saved by Mr. Justice Heath; and the Judges on being consulted were of opinion that the prisoner was not guilty of larceny, but only of a breach of trust; the money never having been put in the till, and therefore not having been in possession of the master as against the defendant. And Waite's case before mentioned was very mainly relied on, in order to show that this was a mere breach of trust; confirmed as the doctrine there laid down had been by the acts of the legislature, in providing in

future against embezzlements of that sort in the particular case of the bank, by the act of the 15 Geo. 2, C. 13, and by similar statutes in regard to the post-office and other cases. And the particular contract between the prisoner and his employers was also insisted upon, as distinguishing this from the general case of master and servant.

During the argument, Eyre, C. J., observed, that Charlewood's case, and other cases of the sort, turned upon the possession having been unlawfully obtained by the prisoner; but that here there was no evidence to find such an original intention to steal, because the possession came to the servant in the ordinary course of his business, without any act of his own for that purpose.

For the crown, it was insisted upon as a general rule, that in the case of personal chattels the possession in law follows the right of property. That if by law the possession of the servant were that of the master, which could not be denied, then no compact between them to indemnify the master could do away the operation of the law. That the customer could do away the operation of the law. That the customer did not mean to deposit the notes as a matter of trust in the clerk's hands; for they were paid in the bank's own house, of which the defendant was one of the organs; and therefore it was like paying money into the hands of the bankers themselves; and the act of receipt by the clerk co-instanter vested the possession in them. That in Bull's case the servant had authority to sell the goods, and was only accountable for their value; but the prisoner had no authority to dispose of the notes which he received in the shop. But there could be no doubt in that case, if the servant had embezzled the master's goods out of his shop it would have been felony. That considering this act a bailment, yet part of the property being deposited in its proper place, the separating the other part made it a felony, for the bailment was entire. That in Wait's case there was a personal confidence reposed in him by the person making the deposit, in the known authenticated character of *cashier of the Bank.* The act of parliament directing the deposit to be with the *cashier of the Bank;* and therefore a delivery to him at any place would have been sufficient.

Lord Kenyon, C. J., thereupon observed, that the provisions of that act would hardly warrant an inference that the deposit was directed to be made personally with the cashier, but merely with him as an officer of the corporation who must act by their agents. And Lord C. J. Eyre remarked that the money and bonds were to be paid *to the Bank*, though *the cashier's receipt* was to be a discharge so as to bind the Bank.

It was then said that the act was made pro majori cautela.

Afterwards, on consultation among the judges, some doubt was at first entertained; but at last all assembled agreed that it was not felony, inasmuch as the note was never in the possession of the bankers distinct from the possession of the defendant; though it would have been otherwise if the prisoner had deposited it in the drawer, and had afterwards taken it. And they thought that this was not to be differed from the case of Waite and Bull, which turned on this consideration, that the thing was not taken by the prisoner out of the possession of the owner: and here it was delivered into the possession of the prisoner. That though to many purposes the note was in the actual possession of the masters, yet it was also in the actual possession of the servant, and that possession not to be impeached, for it was a lawful one. Eyre, C. J. also observed, that the cases run into one another very much, and were hardly to be distinguished. That in the case of the King v. Spears the corn was in the possession of the master under the care of the servant. And Lord Kenyon said he relied much on the act of parliament respecting the Bank not going further than to protect the Bank. The prisoner was accordingly recommended for a pardon.

KRIBS v. PEOPLE.

(81 Ill., 599.)

EMBEZZLEMENT. An indictment charging an ordinary larceny is not sufficient under the embezzlement statute. Nothing that was larceny at common law is larceny under the embezzlement statutes.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the court.

It is not claimed by the state that the defendant is otherwise guilty than under the seventy-fourth section of the criminal code, entitled "Embezzlement," which is as follows: "Whoever embezzles or fraudulently converts to his use, or secretes, with intent to embezzle or fraudulently convert to his own use, money, goods, or property delivered to him, which may be the subject of larceny, or any part thereof, shall be deemed guilty of larceny."

This indictment is for larceny, simply as at common law.

The uniform construction of similar acts, both in this country and in England, is "that the indictment must set out the act of embezzlement, and then aver that so the defendant committed the larceny. 2 Bishop's Criminal Procedure, § 281; 2 Wharton's Criminal Law (ed. of 1841), 281, 282, 283; Waterman's Archbold on Practice, Pleadings and Evidence in Criminal Cases, p. 446, 1, 2, 3, 4, 5, 6, and notes.

The defendant's fiduciary character, which is the distinguishing feature between embezzlement and larceny, must be specially averred. *Com.* v. *Simpson*, 9 Metc., 13; People v. Cohen, 8 Cal., 42; Com. v. Smart, 6 Gray, 15; Com. v. Wyman, 8 Metc., 247; Com. v. Merrifield, 4 Id., 468; People v. Tryon, 4 Michigan, 665; People v. Allen, 5 Denio, 76; Rex v. Johnson, 3 M. and S., 539; Rex v. Creighton, Russ. and Ry., 62. And this rule, instead of being changed, is expressly recognized by section eighty-two of the Criminal Code (R. L. 1874, p. 364), which provides that, in indictments, in cases under the statute relating to embezzlement, "it shall be sufficient to allege generally in the indictment an embezzlement,

fraudulent conversion, or taking with such intent, of funds of such person, bank, incorporated company, etc., to a certain value or amount, without specifying any particulars of such embezzlement."

We are referred, however, by the attorney-general, to Welch v. The People, 17 Ill., 339, and Stinson et al. v. The People, 43 Id., 397, as settling the law in this state, the evidence of an embezzlement will authorize a conviction for larceny.

This is a misapprehension as to the effect of what was decided in those cases.

The conviction there was for larceny, as at common law, and no question was raised or discussed under the statute relating to embezzlements, and it was *held*, in both cases, the evidence authorized the jury in finding that defendant, in obtaining possession of the property, in the first instance, did so with a felonious intent. The distinction between larceny and obtaining goods under false pretenses, was the turning point in each case, and it was thus pointed out in Stinson's case: "If the owner of goods alleged to have been stolen, parts with both the possession and the title to the goods, to the alleged thief, then neither the taking nor the conversion is felonious. It can but amount to a fraud; it is obtaining goods under false pretenses. If however, the owner parts with the possession voluntarily, but does not part with the title, expecting and intending the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon, for his benefit, then the goods may be feloniously converted by the bailee, so as to relate back and make the taking and conversion a larceny, if the goods were obtained with that intent."

But the section of the Criminal Code quoted, relates to a class of cases which were not larceny at common law, that the statutes in relation to embezzlements "were passed solely and exclusively to provide for cases which larceny at common law did not include. Hence, nothing that was larceny at common law is larceny under the embezzlement statutes; and nothing that is larceny under the embezzlement statutes is larceny at common law." 2 Wharton's Criminal Law (7th ed.), 1905.

Here the defendant sold a town or city lot for the prosecu-

tor, and under his instructions, previously given, it was defendant's duty to loan the money at interest, on good security, for the prosecutor; but, instead of complying with these instructions, he lost the money at gaming. The prosecutor never had the money in his possession at any time, and, therefore, at common law, the offence could not have been laceny; 2 Wharton's Criminal Law (7 ed.) §§, 1830, a (p.), 1846, b (g).

The evidence not being sufficient to sustain the conviction for larceny, the judgment must be reversed.

Judgment reversed.

W. SIMCO v. THE STATE.

(8 Texas Ct. of App., 406.)

EMBEZZLEMENT.—Though kindred to theft, embezzlement is a separate and distinct offence. Theft involves the idea of an unlawful acquisition, whereas embezzlement is the fraudulent conversion of personal property after its possession has been lawfully acquired.

The Revised Code of Criminal Procedure, article 714, authorizes a conviction for embezzlement under an indictment for theft. But a retractive operation cannot be allowed to this new provision; and therefore in a trial for theft alleged to have been committed before the Revised Code took effect, it was error to instruct the jury to convict for embezzlement if they found the possession of the converted property was lawfully acquired by the accused.

Appeal from the District Court of Tarrant.

The indictment was found in May, 1879, and charged the appellant with the theft, December 28, 1878, of a wagon, horse and mule, the property of P. D. Williamson. The jury found him guilty of embezzlement of property over the value of $20 and assessed his punishment at eight years in the penitentiary.

The evidence shows that in Christmas week, 1878, the appellant was employed by Williamson to drive the latter's wagon and team to Fort Worth with a load of cotton. The

team consisted of a horse and a mule, and they and the wagon were confided by Williamson to the appellant, who proceeded with them to Fort Worth, and there sold them for $95. As appellant did not return to Williamson's the latter went to Fort Worth and reclaimed his property from the purchaser. Appellant was pursued and brought back. Though the verdict was for embezzlement the judgment was for theft.

Clark, J. The offence of embezzlement, while nearly akin to larceny, and generally regarded as of that family, is nevertheless a separate and distinct offence, and essentially variant from the latter. Theft is the fraudulent taking of personal property under certain designated circumstances, and necessarily involves the idea of an unlawful acquisition. Embezzlement is the fraudulent conversion of similar property after its possession has been lawfully acquired. This variance in the character of the two offences led the legislature, in the adoption of the Revised Code of Criminal Procedure, to provide expressly that in a prosecution for theft a conviction might be had for "embezzlement, and all unlawful acquisitions of personal property punishable by the Penal Code." Code Cr. Proc., art. 714, sect. 6. Prior to this change in the law, it was permissible to convict, under an indictment for theft, only for all unlawful acquisitions punishable by the Code, Pasc. Dig., art. 3096, sect. 5.

In view of this legislation, and the difference in the two offences of theft and embezzlement, we are constrained to hold that, in a prosecution for theft occurring prior to the adoption of the Revised Code, it was error for the court to instruct the jury to convict of embezzlement, if the facts showed the commission of that offence instead of the offence of theft, and that a verdict so found is not supported by the indictment. The new provision in the Code cannot be made to act retrospectively. Callaway v. The State, 7 Texas Ct. App., 585.

The entry of the judgment, adjudging appellant guilty of theft upon a verdict finding him guilty of embezzlement, would not necessitate a reversal of the case, but only a reformation of the judgment by this court. Pasc. Dig., Art. 3208; Rev. Code Cr. Proc., Art. 869.

The judgment is reversed and the cause remanded, in order that the matter may be further investigated and acted upon by the grand jury of Tarrant county.

Revised and remanded.

J. W. WEBB v. THE STATE.

(8 Texas, Ct. of App., 310.)

EMBEZZLEMENT.—In order to sustain a prosecution for embezzlement against an agent, four distinct propositions of fact must be established in evidence, beyond a reasonable doubt. These are as follows: 1. That the defendant was an agent. 2. That he received money belonging to his principal. 3. That he received it in the course of his employment. 4. That he embezzled it.

The embezzlement statutes do not reach all breaches of duty by agents nor provide a criminal remedy for the enforcement of their contracts.

M. A. Oatis, C. T. Kouns, O. T. Plummee, and W. F. George, for the appellant.

Thomas Ball, Assistant Attorney-General, for the State.

CLARK, J. In order to sustain a prosecution for embezzlement against an agent of a private person or corporation, four distinct propositions of fact must be established in evidence, beyond a reasonable doubt. These are as follows: 1. That the defendant was the agent of the person or corporation as alleged, and by the terms of his employment was charged with the duty of receiving the money of his principal. 2. That he did so receive money belonging to his principal. 3. That he received it in the course of his employment. 4. That he embezzled, misapplied, or converted it to his own use. Leonard v. The State, 7 Texas, Ct., App., 417; Ex Parte Hedley, 31 Cal., 108. Evidently, the money received and embezzled must belong to the principal or employer, and the identical money received must be that embezzled; for if, by transmutation or change, it looses its essential characteristic as property of the principal, and becomes at any time the pro-

perty of the agent, it ceases to become the subject of embezzlement.

Statutes of embezzlement were not intended to provide against every breach of duty or pecuniary obligation on the part of agents and the like towards principals or employers; nor does the law regard the latter class with such peculiar favor as to provide a criminal remedy for the enforcement of their contracts and the collection of their debts. These statutes necessarily require a careful discrimination in their application to the various cases that may arise, and it is sometimes difficult to make out with entire precision the line of demarcation between acts punishable as crimes, under these statutes, and those that may not be embraced by them, while they may yet present strong cases of breach of good faith and violation of the confidence reposed in the party guilty of the breach of trust. The true test may be found in an application of the four propositions just above stated, to the facts of the particular case, and if either of the ingredients mentioned be found wanting, it may be safely assumed that the statutes do not apply. 2 Bishop's Cr. Law, Sects. 355, 356; 3 Archb., Cr., Pr. and Pl., 449, et seq.; 2 Russ. on Cr., 181, 182; The Commonwealth v. Stearns, 2 Metc., 343; The Commonwealth v. Libby, 11 Metc., 64.

The indictment in this case charges the appellant with embezzlement of $87, the property of the Singer Manufacturing Company, appellant being the agent of the corporation, authorized to receive and in fact receiving said money by virtue of his agency. It was developed in the evidence upon the trial, that, among other transactions between the parties, the appellant, as agent, received five sewing-machines from the principal, and was authorized, outside of the contract, to trade them for stock, if he saw fit. This he did, and subsequently tendered the stock to his principal, which was declined. The manager of the corporation testifies as follows: "I told Mr. Webb he had my permission to trade machines for stock, but that he must account to the company in money. * * * By the contract with defendant, the company was not to take any horses for machines, and he was to sell the property received for machines, and pay over the money."

The legal effect of this authorization, in opposition to the terms of the original contract, was an essential departure from the original employment, and an essential change in the *status* of the agency, as affected by the statutes of embezzlement. By the terms of the contract, the appellant was to receive in payment for machines only money and notes, and these proceeds of sales he was obligated to turn over to the company. Without a variation in the contract, an embezzlement of either class of proceeds would have properly subjected him to prosecution; for beyond question, the money or notes would be the property of the company, and received by him by virtue of his agency. But with a change of the contract there resulted a change in the character of the proceeds received from a sale of the machines. When defendant exchanged them for horses, by authority, and the company refused to receive the horses, to whom did they belong? Not to the company, for it disowned them. The act of sale did not constitute an embezzlement, for that was authorized, and he is not charged with that species of embezzlement. The horses being the property of appellant, the proceeds of their sale were likewise his property, and not specifically the property of the company; and by the action of the latter, it had remitted itself to the character of an ordinary creditor, and held a personal demand against the appellant for the value of their machines, less his commissions, and could not have enforced a suit at law for the specific money received by him upon a sale of the horses. Other features of the evidence tend to sustain this view, and show a disagreement between the parties as to the terms of a proper settlement of the transactions between them, a failure to effect which resulted in this prosecution.

The views we have expressed obviously conflict with those under which the case was submitted to the jury, and a new trial must therefore be awarded. The judgment is reversed and the cause remanded.

Reversed and remanded.

FREDERICK M. KER v. THE PEOPLE.

Supreme Court of Illinois Northern Grand Division, March term A. D., 1884.

EMBEZZLEMENT.—Jurisdiction, Extradition, International Law.

The manner of the capture of one accused of crime who has fled from the Justice of the State, cannot affect in any manner the jurisdiction of the court before whom he is brought for trial.

It is not allowable on the trial of one who has been surrendered by a sister state, under the laws of Congress, as a fugitive from justice, to enquire as to the regularity or irregularity of such surrender, it is sufficient the accused is in court to require him to answer the indictment against him.

Should the laws of a foreign nation be outraged by the wrongful capture and transportation of a party accused of crime and who at the time was domiciled within its jurisdiction, in case a controversy arose it would seem it would be between the two general governments and as to which the state courts could determine nothing.

That which was done, if wrong, was in violation of international law, and if the government of Peru does not complain of the infraction of international law, it does not lie in the mouth of defendant to make complaint on its behalf.

Had defendant pleaded immunity from prosecution on the counts which charged him with embezzlement, and not as to the count that charged him with larceny as at common law, which is an extraditable crime under the treaty with Peru, the plea might have been good, as to the counts which charged him with embezzlement. That he did not do. By his plea he sought immunity from prosecution on the whole indictment. Being bad as to one count the plea would be bad as to the whole indictment which it professed to answer.

It is sufficient under the law of this State the property is alleged in the indictment to belong to the persons who in fact own it or have a special interest in it.

Embezzlement is a crime defined by statute, and it was entirely competent for the legislator to declare what acts would constitute the crime and fix the measure of punishment.

The statute has a broad meaning and will embrace all wrongful conduct by confidential clerks, agents or servants and leave no opportunity for escape from just punishment on mere technical objections not affecting the guilt or innocence of the party accused.

Where a defendant's employment gives him access for any purpose to his master's property, or brings it under his care, charge, or custody for safe keeping, preservation or security, the fiduciary or confidential rela-

tion is complete. It is enough, that his position, whatever it was, gave him access for some purpose to the place where the property was kept.

Under Secs. 75 and 76 of the Criminal Code of Illinois the defendant may be charged with the embezzlement of several different sums of money, or articles of security which have been fraudulently converted by him at different times extending through the whole period of his employment, and the people will not be required to elect as to any particular item or items the whole evidence of what he did by reason of his confidential relation may go to the jury, and if the jury find from the whole evidence that any money or securities have been fraudulently converted to his own use by defendant, that will be sufficient to sustain the charge of embezzlement.

A bank clerk, who had access to the vaults, took money and securities therefrom and converted the same to his own use. Held that he was rightly convicted of embezzlement.

The statute of Illinois defining the crime of embezzlement is much more comprehensive than any English statute on the same subject, and especially that section which defines embezzlement by a clerk or confidential agent, and the decision of the English courts construing their own statutes in no way assist to a correct understanding of the statutes of this state on the same subject.

The case is sufficiently stated in the opinion of the court.

Robert Hervey and C. Stuart Beattie, for plaintiff in error.

Mr. Luther Laflin Mills and Messrs. Sweat, Haskell & Grosscup, for the people.

SCOTT, J. It appears from the record before this court that at the February term, 1883, of the Criminal Court of Cook County, the Grand Jury presented in open court an indictment against Frederick M. Ker, which contained four counts, in the first of which he is charged with embezzlement as bailee, in the second with embezzlement as a clerk, in the third with larceny as at common law, and the fourth with receiving stolen property. In the several counts the money, funds and securities alleged to have been embezzled, and stolen, are alleged to be the personal goods and property of David Preston, Samuel A. Kean and Elisha Gray, a co-partnership firm under the name of Preston, Kean & Co. On the 13th day of October, 1883, defendant on being arraigned, filed a plea to the jurisdiction of the court over his person, the effect of which was to ask immunity from

prosecution on the indictment then pending against him for the reasons set forth in his plea. To that plea a general demurrer was sustained and defendant was by the court required to plead over. Against the protest of defendant that he was entitled to immunity from prosecution for the offence alleged against him on the indictment, on account of the matter set forth in his plea, and because he refused to plead over, the court entered a plea of not guilty for him. On the trial the jury found defendant guilty of embezzlement as charged in the indictment and fixed the term of punishment at ten years in the penitentiary. A motion for a new trial entered by defendant was overruled and the court pronounced judgment on the verdict, and defendant brings the case to this court on error.

One ground of error relied on with much confidence is the decision of the court sustaining the demurrer to defendant's plea, calling in question the right of jurisdiction of the court to proceed with the trial against him, or what is the same thing it is insisted it was error in the court not to grant him immunity from prosecution.

Of course the demurrer admits the facts alleged in the plea and there can be no controversy as to what they are. Shortly stated, the principal facts are, that upon the written request of the Governor of Illinois, the President of the United States issued an extradition warrant directed to the Government, and named therein Henry G. Julian as messenger, to receive defendant from the authorities of Peru. The crime of larceny with which defendant stood charged is one of the offences specified in the treaty for which a party should be surrendered, and it was specified in the President's warrant as the crime for which his surrender was demanded. On the same day the executive warrant issued, the Secretary of State at Washington made a written request upon the United States Consul acting at Lima, to procure the executive of Peru to surrender defendant to Julian, under the treaty between the United States and Peru, of September 12, 1870, which it is averred was and is the only treaty in force between the two Governments. It is then averred no request was ever made by the United States Consul at Lima, or by Julian or any other

person before any of the authorities or diplomatic agents of the government of Peru, for the surrender of defendant in compliance with the President's warrant, nor was any consent or authority given by the authorities or diplomatic agents of Peru, to Julian, or to any other person, to arrest and remove defendant from Peru for any cause, and on the 3d day of April, 1883, while defendant was domiciled at Lima, in Peru, Julian, with the aid of persons whose names are unknown, without any authority or warrant from the authorities or diplomatic agents of Peru, arrested defendant and forced him to go to Callao and then placed him on board the steamship "Essex," and kept him a close prisoner on such vessel.

Afterward the "Essex" sailed to the port of Honolulu, with defendant on board, and there at that port, but perhaps outside the harbor, defendant was transferred to the "City of Sidney" an American ship about to sail for San Francisco in California. The steamship "Essex" was a vessel belonging to the navy of the United States, and was at the time commanded by officers of the navy. The "City of Sidney" was perhaps an American merchant vessel, but how that is matters little. While these events were transpiring, the parties prosecuting, procured from the Governor of the State of Illinois, a requisition upon the Governor of California, for the arrest of defendant, in which Frank Warner was named as a suitable person to receive defendant from the authorities of California, and bring him to this State for trial. Afterwards, the Governor of California issued his warrant in pursuance with the requisition of the Governor of the State of Illinois, for the arrest of defendant. On his arrival at San Francisco, in the "City of Sidney," defendant was arrested on the warrant of the Governor of California, and delivered to Frank Warner, the messenger named to receive him, and was by him brought into this State, and delivered into the custody of of the Sheriff of Cook county, where the indictment on which he was afterwards tried was found, and was then pending in the Criminal court against him. Other matters are contained in the plea, but as they are not necessary to an understanding of the discussion that is to follow, they need not be stated.

One proposition asserted by counsel for the defence is, the

Criminal court of Cook county never obtained jurisdiction of defendant by "due process of law," for the purpose of trying him for larceny or any other crime.

The position taken on this branch of the case is much weakened by the consideration, it appears from the averments of the plea itself, the bringing of defendant *into* the State, trying him for an offence committed within the limits, *was* by "due process of law," whatever wrong may have been done him elsewhere. The Governor of the State of Illinois made a requisition upon the Governor of the State of California, for the surrender of defendant as a fugitive from the justice of the State, and designated Frank Warner to receive defendant and bring him back to this State. In compliance with that requisition, the Governor of California did issue his warrant upon which defendant was arrested within the jurisdiction of the State, and delivered into the custody of Frank Warner, who brought defendant into this State and delivered him to the Sheriff of Cook county. That it was in accordance with usage and law. It is not allowable on the trial of one who has been surrendered by a sister State under the laws of Congress, as a fugitive from justice, to enquire as to the regularity or irregularity of such surrender.

It affects neither the guilt or innocence of the accused nor the jurisdiction of the court to try him.

Conceding as may be done, defendant was arrested in Peru and brought into the State of California without warrant of law, the State now prosecuting defendant was not a party to any violation of any treaty or other public law. The application the State made to the Executive department of the General Government, was for the legal arrest of defendant, and if there was any abuse of the warrant of the Federal Goverment, or any treaty obligation with a friendly power violated, it was not done by the State now conducting the prosecution against defendant. Julian, to whom it was made the illegal arrest of defendant and brought him within the jurisdiction of the State of California, was acting either under the warrant of the President or on his own responsibility. He did not bring defendant into this State at all. It was done by another person on a requisition from the Governor of Illinois, and on a warrant

issued by the Governor of California for his arrest in that State.

Of the action of the State prosecuting him, defendant can have no just ground of complaint that he was brought within its jurisdiction without "due process of law." The People v. Rowe, 4 Parker Cr. Rep., 253; Advance v. Lagrave, 59 N. Y., 110; The State v. Ross, 21 Iowa, 467.

But waiving every objection to the plea that may seem too technical, and considering it on the broadest grounds taken on its support, it is thought the demurrer was properly sustained. Three propositions are stated, which if they can be maintained, it is insisted, lead to the conclusion the Criminal Court of Cook county never obtained jurisdiction of defendant, to try him for larceny or other crime. 1st. That the United States by its treaty with the Republic of Peru, provided "due process of law" for getting jurisdiction of persons domiciled in that country, charged with having committed certain crimes, among which is larceny, of which defendant was charged in one count of the indictment against him. 2d. That such "due process of law" must be obeyed in all its terms, expressed or implied, and 3d. That such "due process of law," for the purpose of getting jurisdiction in such cases, by necessary implication, excluding any other mode of getting jurisdiction.

The defendant was not in fact brought within the jurisdiction of the United States, under its treaty with Peru, but the argument assumes that if defendant was brought back to the United States, otherwise than under the treaty between the United States and Peru, his capture and detention would be unlawful, as being in violation of a right of asylum he is supposed to have had, under the treaty, at the place he was domiciled when captured. No principle is suggested on which this proposition can be maintained as broadly as stated, nor in any case English or American, cited, where the decision was rendered on analogous facts with the case being considered, that holds the doctrine contended for. Undoubtedly, at common law, the rule is, the court trying a party for a crime committed within its jurisdiction, will not investigate the manner of his capture, in case he had fled to a foreign country and had been brought back to its jurisdiction, although his capture had

been plainly without authority of law. It is sufficient the accused is in court, to require him to answer the indictment against him. It is thought and with good reasons, any other rule would work great embarrassment in the administration of the criminal law. In ex parte Scott, 9 Barn. and Cress., 446, the accused was arrested at Brussels by a police officer, without any warrant by law, and brought back to England. The prisoner was brought up on Habeas Corpus, that she might be discharged. It appeared a true bill had been found against her for a misdemeanor, and Lord Linderden before whom the writ was heard, refused to enquire into the circumstances of her arrest, whether it was legal or illegal, and held the accused amenable to jurisdiction.

It was said in that case, if the acts complained of were done against the law of a foreign country, that country might have vindicated its own law. It does not seem to be doubted that this case accurately states the common law on this subject. Nor is it doubted that many well considered American cases declare the same doctrine. The State v. Smith Bailey (South Cor.) Law Rep., 2814 and note. The State v. Brewester, 7 Vir., 118. Advance v. Lagrave, 59 N. Y., 110. The State v. Ross, 21 Iowa, 467. U. S. v. Calwell, 8 Blatch, 131. U. S. v. Lawrence, 13 Blatch., 295.

The rule is different in civil cases, for the reason, a party guilty of a fraud in bringing a party within the jurisdiction of the court will not be permitted to have a personal advantage from his own wrongful conduct.

It may be well to recur again to the distinction taken by counsel, which it is insisted takes the case being considered out of the rule established by the English and American cases cited, that some further discussion may be had upon it. The position taken is that where a treaty exists between two governments, no capture can lawfully be had of a party accused of crime in the country to which he has fled for asylum, except under the terms of such treaty, and if a capture and removal of a party is made in violation of the treaty, it is without "due process of law," and the court within whose jurisdiction the accused is wrongfully brought, obtains no rightful jurisdiction to try him for any crime, either for the crime for which

it was attempted to extradite him or for any other crime. This exact question arising in this case was not involved in either of the cases *ut supra*, nor indeed has the attention of the court been called to any case where the facts were precisely analogous.

Of course, no one would contend the manner of the capture of one accused of crime who has fled from the jurisdiction of the State, could affect in any manner the question of his guilt or innocence of the crime charged in the indictment, and how can it affect the jurisdiction of the court before whom he stands, to try him for crime is a proposition not supported by any satisfactory reasoning nor by the analogies of the law. But place it on the yet broader and perhaps more reasonable ground, it is not perceived how any irregularity in the capture and return of a fugitive from the justice of the state, can secure him immunity from prosecution for crime whether it is one for which he might be lawfully extradited under any public law or not. No reason arising out of any public exigency or any consideration as to the liberty of the citizen requires the adoption of any such doctrine into the jurisprudence of the State.

Should the laws of a foreign nation be outraged by the wrongful capture and transportation of a party accused of crime, and who at the time was domiciled within its jurisdiction, in case a controversy arose it would seem it would be between the two general governments, and as to which the state courts could determine nothing. It is confidently insisted all through the argument for the defendant, that defendant's right of asylum under the treaty between the two governments was complete when he was domiciled in Peru, and that he has been deprived of that right by sheer force, without "due process of law." But is the position tenable? Upon what principle can it be maintained?

As a question of law, on the facts as stated in the plea, defendant never had any right of asylum in Peru that would secure him immunity from arrest on account of offences mentioned in the treaty, and for which a party was subject to extradition. Conceding, as may be done for the purpose of this decision, the proposition insisted upon, the enumeration

of certain crimes in the treaty for which a party may be extradited, implies that as to all other offences he is guaranteed asylum in the country where he is domiciled, how does that, if true, affect the question being considered? As to the crime of larceny with which defendant was charged he could have no right of asylum in Peru as that is one of the crimes enumerated in the treaty, and what right secured by treaty, was violated when he was arrested either with or without due process of law? The accused was subject to extradition at any time under the treaty, and what difference can it make in law as to the right of a state court to try defendant for an extradition crime, whether the existing treaty was in fact observed in all its features. That which was done if wrong, was in violation of international law, and if the government of Peru does not complain of the arrest of defendant within its jurisdiction as an infraction of international law, it does not lie in the mouth of defendant to make complaint on its behalf. Questions arising under international law concern principally the nations involved and their settlement is a national affair. Rejecting as must be done, the erroneous assumption, defendant had the right of asylum in Peru, under the treaty between the two governments, and the argument for the defence is wholly without force. It is plain he had no right of asylum the law of either government would protect. He, as to the crime of larceny with which defendant stood indicted, had provided no asylum that would secure him immunity from arrest for that crime in the country where he was domiciled. The utmost that can be claimed is that the person having the President's warrant for the extradition of defendant proceeded irregularly, and may have rendered himself liable as for a personal trespass, but he deprived defendant of no right of asylum in the country of his temporary domicile, for the simple reason he had none secured by any public law of which he could be dispossessed.

The attention of the court has been called to Com. v. Haines, 13 Bush., 700; The State v. Vanderpool, 16 vol., C. L. N. p. 34, and other analogous cases upon which great stress is laid as holding principles it is insisted ought to control the present decision. These cases have been examined and it is

found they hold the doctrine, a fugitive from the justice of the state, who has been brought back from the country to which he had fled, on a warrant of extradition in conformity with the terms of a treaty existing between the two governments cannot be proceeded against or tried by the state for any other offence than those mentioned in the treaty, and for which he was extradited, without first being afforded an opportunity to return to the country whence he had been brought. Some of these cases also declare the familiar principle of international law, that the right of one government to demand and receive from another the custody of an offender against its laws, and who has sought an asylum in such foreign country, depends upon treaty stipulations between such governments. Where no treaty exists, no obligation that can be insisted upon exists to surrender criminals for trial to the government from which they fled, but as a matter of course between friendly nations, great offenders are usually surrendered on request from the government claiming the right to try them. A principle running through this latter class of cases has much that commends itself to a sense of justice. It is that where a person whose extradition has been granted for trial, for a particular crime named in the extradition warrant, the demanding government obtains no lawful right to try him for any other offence without bad faith to the government that consented to his extradition, and for which it would have just grounds to demand reparation. Such an act would be in violation of both the letter and spirit of the treaty. But this doctrine, if it shall be conceded it has for its support natural justice and even the weight of authority, can have no application to the case being considered. Here the complaint is, the treaty was not observed in the capture and detention of defendant. It was done by force outside of its provision. The extradition warrant, issued by the executive of the United States, demanded defendant should be surrendered on a charge of larceny that he might be tried for that offence. That is an extraditable crime under the treaty with the government of Peru. It was on that charge he was put on trial. It is true he was not convicted of larceny as at common law, but the same indictment contained counts for embezzlement, an offence, of which if

convicted, the statute declares "He shall be deemed guilty of larceny," upon which he was tried at the same time of the trial of the charge of larceny, and was convicted.

Embezzlement as defined in section seventy-four and seventy-five of the criminal code of this state, is not larceny at common law, and is perhaps not larceny in the sense that term is used in the treaty with Peru, and for which a party may be extradited. Had defendant pleaded immunity from prosecution on the counts which charge him with embezzlement, and not as to the count that charges him with larceny as at common law, which is, as has been seen, an extraditable crime under the treaty with Peru, then a closer analogy, would have existed between his case and the cases last cited, and the question might have been presented whether this court would adopt the doctrine of those cases as sound law. That he did not do. By his plea he sought immunity from prosecution on the whole indictment. The plea might have been good, as to the counts that charge embezzlement, being a non-extraditable offence, and not embraced in the extradition warrant, and not good as to the count that charges larceny as at common law, which it is conceded was an extraditable offence and was embraced in the extradition warrant. Being bad as to one count the plea would be bad as to the whole indictment which it professes to answer. There is another reason that leads to the same conclusion, the case in hand is not within the rules declared in the latter line of decisions. It is that defendant, as has been seen, was not surrendered by the government of Peru under its treaty with the United States. According to the averments in the plea, no effort was made to obtain defendant on the extradition warrant, and the official authorities of Peru were not asked to, and never did consent to his capture within the jurisdiction of that government. It was done by sheer force and not under the treaty at all. That brings the case more nearly under the decision first cited and they must be regarded as of controlling authority.

But aside from all authority, on principle, defendant has shown no right to immunity from prosecution for the offences for which he was indicted. The Federal government has itself violated no treaty with the Republic of Peru. The arrest

and detention of defendant was not by any authority of the general government, and no obligation is implied on the part of the Federal or any state government, to the Republic of Peru, to secure defendant immunity from prosecution for any offence. What was done was done by individual wrong, precisely as was done in ex parte Scott, supra, and the State v. Brewster, supra. The invasion of the sovereignty of Peru, if any wrong was done, was done by individuals, perhaps some of them owing no allegiance to the United States, and not by the Federal government. Should the government of Peru complain its sovereignty had been invaded by citizens of the United States, that would be a question arising under international law and not under any act of Congress or treaty of the United States. Nor will defendant be permitted to complain that his right of asylum in Peru has been violated, for as before stated, he had no right of asylum as against the crime of larceny, under the treaty with Peru, nor any absolute right to asylum under comity existing between nations.

Whether a nation will surrender a fugitive from justice that seeks with it an asylum, is a question of national comity resting in discretion. In no view that can be taken is defendant entitled to immunity from prosecution on the indictment under which he was convicted.

Errors have been assigned that affects the merits of the case on the trial, that must be considered. That defendant converted to his own use large sums of money and securities belonging to the firm of Preston, Kean & Co., or to other persons, in their care and custody, admits of no doubt. There is no pretense that he is not guilty of criminal conduct. The objections taken to the legality of his conviction are of the most technical character.

The point is made there is a variance in the pleading and the proof. It is alleged in the indictment, the funds and securities embezzled were the personal goods of David Preston, Samuel A. Kean and Elisha Gray, a co-partnership under the name of Preston, Kean & Co., and the insistence is, the firm in law was composed of David Preston, Samuel A. Kean and James Payne with Elisha Gray as special partner. Certified copies from the record and files of the County Clerk's office

show the formation of a limited partnership pursuant to the provisions of the statutes, and that the firm was at one time composed of David Preston, Samuel A. Kean and James Payne, as general partners, with Elisha Gray as special partner. That was in May, 1881. The oral testimony given shows that in November, 1881, the special partnership ceased, and since then the firm as a matter of fact has been composed of David Preston, Samuel A. Kean, and Elisha Gray.

The partnership articles of May, 1881, were made a matter of record, but it does not appear there were any partnership articles after that date, and it is insisted it is not legal to show by oral evidence, as was done, that Payne ceased to be a partner in November, 1881. The objection taken, rests on section 12, Chap. 84, R. S., 1874, which provides, no dissolution of a limited partnership shall take place except by operation of law, before the time specified in the certificate made a matter of record, unless a notice of such dissolution is also recorded in the same registry, and other provisions of the statute complied with. The time for the duration of the partnership, under the Articles of May, 1881, had not expired in November, 1881, when an agreement was made between the partners that Payne should cease to be a partner, and Gray should become a general partner. The firm name continued as it was, but no notice of the change of the persons composing the firm was made a matter of record, nor was any other public notice given, as the statute requires shall be given.

On account of the non-compliance with the statute in this regard, it is said the firm should be regarded as still being composed of the same persons as composed it under the articles of May, 1881. That may be true as to creditors and persons dealing with the firm without actual notice, but as between the partners themselves Payne had no interest whatever in the firm assets, after the agreement he should cease to be a partner. It is sufficient under the law of this state that the property is alleged in the indictment to belong to the person who in fact own it or have a special interest in it. That was done in this case, and there is no variance between the proof and the allegations of the indictment in this respect.

It is insisted the evidence shows a cumulation of offences,

and for that reason it was error in the court to deny defendant's motion, to compel the prosecution to elect upon what alleged act of larceny or embezzlement a conviction would be asked. The court by its rulings submitted all the evidence touching the embezzlement of funds and securities by defendant, to the jury, and it is not perceived how it could properly have done otherwise. Embezzlement is a crime defined by statute, and it was entirely competent for the legislature to declare what acts would constitute the crime and fix the measure of punishment. One element that enters into the statutory definition of embezzlement is the fiduciary or confidential relation. Such relation affords the amplest opportunity to misappropriate money, funds and securities, and often presents great difficulty in proving exactly when and how it was done. This is especially true with regard to clerks and confidential agents in banks or other corporations or firms doing a large business and who are entrusted in whole or in part with the care or custody of funds, securities and property belonging to banks or other corporations, or to a co-partnership. It is difficult in such cases, if at all possible, to prove with certainty when or how the embezzlement was effected. It is of course done with a view to avoid detection, and the confidential relation existing wards off suspicion. The embezzlement may and most often does consist of many acts done in a series of years, and the facts at last disclose that the employer's money and funds are embezzled, is the crime against which the statute is leveled.

In such case, should the prosecution be compelled to elect, it would claim a conviction for only one of the many acts of the series that constitute the corpus delicti. It would be doubtful if a conviction could be had under Section 75 and 76 of the Criminal Code against the clerk in a bank or other corporation or a co-partnership, although the accused might be conceded to be guilty of embezzling large sums of money in the aggregate.

It might be otherwise, or different, under Section 74 of the Criminal Code, where distinct sums of money or articles of personal property are or may be delivered to the accused on different occasions.

Such distinct acts might very readily be susceptible of direct proof, for the act of delivering implies actual knowledge in some one who could be a witness. But no such opportunity is afforded to make direct proof as to acts done under Sections 75 and 76, defining embezzlement.

The body of the crime consists of many acts done by virtue of the confidential relations existing between the employer and the employee, with funds, moneys or securities, over which the servant is given care or custody in whole or in part, by virtue of his employment. The separate acts may not be susceptible of direct proof, but the aggregate result is, and that is embezzlement. To avoid the difficulty no doubt that might be encountered in making proof in such cases, it is provided by statute Section, 82 of the Criminal Code, in the prosecution for the offence of embezzling, fraudulently converting to one's own use, or fraudulently taking or secreting with intent so to embezzle and convert, the bullion, money, notes, bank notes, checks, drafts, bills of exchange or other securities for money, by a cashier or other officer, clerk or agents of such person, bank, incorporated company or corporation, or co-partnership, it shall be sufficient to allege generally in the indictment an embezzlement, fraudulent conversion or taking with such intent, funds of such person, bank, incorporated company or co-partnership, to ascertain value or amount without specifying any particulars of such embezzlement. Indeed, in the very nature of the crime, it would be impracticable in most cases to do more. The case being considered, shows in a marked degree the necessity for the rule provided by statute, otherwise it would be difficult to make the proof and the allegations of the indictment correspond. On the trial the same liberal rule for the detection and punishment of persons guilty of misconduct by reason of their confidential relations with their employer prevails, for it is provided in the same section of the Criminal Code, evidence may be given of any such embezzlement, fraudulent conversion or taking with such intent, and it shall be sufficient to maintain the charge in the indictment, if it is proved, that any bullion, money, note, bank note, check, draft, bill of exchange or other securities for money, of such person, bank, incorporated company or co-

partnership, of whatever value or amount, was fraudulently embezzled, converted or taken with such intent by such cashier or other officer, clerk, agent, or servant, under this rule, which is certainly a wise one, it was proper the court should permit all the evidence of what defendant did by reason of his confidential relations with the banking firm whose clerk he was, to go to the jury, as was done, and if the jury found from the whole evidence, any funds or securities for money had been embezzled or fraudulently converted to his own use by defendant, it was sufficient to maintain the charge of embezzlement, as that crime is defined in the 75th and 76th Sections of the Criminal Code.

Any other rule would render it exceedingly difficult to secure a conviction under either of these sections of the statute. The view taken by the defence of this statute is too narrow and technical to be adopted. It has a broader meaning, and when correctly read it will embrace all wrongful conduct by confidential clerks, agents or servants, and leave no opportunity for escape from just punishment, on mere technical objections, not affecting the guilt or innocence of the party accused. The cases of Krib v. The People, 82 Ill., and Goodhue v. The People, 94 Ill., 37, cited by the defence, were prosecutions for embezzlement under other sections of the Criminal Code, and illustrate no phase of the case being considered. There was no error in the court refusing to require the prosecution to elect for what particular act of embezzlement a conviction would be asked.

The last ground of objection is, the verdict is without evidence and against the law. Ordinarily, whether there is evidence to warrant a conviction is a question for the jury, the court taking care always to see that no manifest injury is done. With that view the evidence has been considered. It is seen the testimony of other witnesses taken in connection with defendant's letter to the banking firm, written on the eve of his departure, with the schedule attached of securities and money embezzled, constitute ample proof of the corpus delicti. It would answer no good purpose to enter upon an analysis of the evidence, it is sufficient to state the conclusion reached. But whether the verdict is contrary to law is a

question for the court, and that has been fully considered. The objection in this regard goes to the extent, that admitting all the evidence tends to prove it does not constitute embezzlement under the 75th Section or any other section of the Criminal Code. The argument on this branch of the case is based on a misconstruction of the section of the Criminal Code defining the crime of embezzlement. There are two counts in the indictment that charge defendant with embezzlement. On examination it will be seen they are both substantially in the language of the statute, and that is all that the law requires. In the last count it is charged defendant embezzled securities for money, gold coin and other funds and property, of Preston, Kean & Co. "then and there entrusted" to defendant, and in the 2d count it is charged, defendant being then and there a clerk in the employ of Preston, Kean & Co., fraudulently and feloniously did, without then and there having the consent of such firm, embezzle and fraudulently convert to his own use a large amount of the personal goods, funds and money, all of which is described with sufficient particularity which personal goods, money and funds, "then and there came to the possession" of defendant "by virtue of such employment." It will be observed the 75th section of the statute under which the second count in the indictment was evidently framed, makes it an offence for a person occupying such confidential relations to embezzle property of his employer or that of another, that comes to his possession or under his care, or to secret the same with intent to do so, "by virtue of his employment" with the owner or owners.

The words "under his care," found in the 75 section of the statute, are not used in this second count of the indictment, and it is contended the proof fails to show the funds and property alleged to have been embezzled, were ever in the possession of defendant by virtue of his employment, and for that reason it is said he is not guilty under this count. The word "care," as used in the statute, is the equivalent of "custody," and may mean "charge," "safe keeping," "preservation," security, and it would seem it was in that sense it was used in the statute. "Possession," as used in the same section, has perhaps a slightly different and broader meaning than the word

"care," but it may also mean "to keep," "to take or seize hold," "to hold or occupy," as an owner of property would or might do. It matters little whether one or both words were used in the indictment. A close reading of the testimony will show the funds embezzled were quite as much in the *possession* of defendant as *under his care*. It is idle to say, in view of the relations defendant sustained to the banking firm, as disclosed by the testimony, that the funds and securities in the vaults were not in possession of defendant, and other persons employed about the Bank, and who had access to such funds and securities for one purpose or another. If the indictment cannot be maintained on the ground the funds and securities embezzled were in the *possession* of defendant, as that term is used in the statute by virtue of his employment, it could not, had it been alleged they were under his care, or had it been charged they came both to his possession and under his care by virtue of his employment, and a case would be presented where a clerk converted to his own use $44,000 of his employer's money and securities, and yet guilty of no crime within the meaning of this section of the statute. So narrow a construction as that insisted upon, would render nugatory this section of the statute, which defines embezzlement by clerks and confidential agents.

It seems to be claimed as to the money, bonds and property alleged to have been embezzled of his employers, the taking of them out of the vaults by defendant was larceny at common law, and therefore could not be embezzlement under the 75 section of the Criminal Code. No such subtle reasoning as that will satisfy the common understanding. It is not denied that defendant converted to his own use large sums of money and securities belonging to the Bank, while he was in its employ as a clerk, and that such funds did in some way come to his possession.

How did he come to get possession of such funds and securities for money, if it were not by virtue of his employment? Had he not been in the employ of this banking house he could have had no access to those vaults.

No attempt will be made to ascertain defendant's exact relation with the Bank. It is enough to know his position,

whatever it was, gave him access for some purpose at least, to the vaults, where the funds and securities were kept, and that brought the funds and securities embezzled, into his possession, or, what is really the same thing, under his care, in a measure, by virtue of his employment. It was simply by virtue of his employment, and not otherwise, that he got possession of his employer's money and securities and converted the same to his own use, and that is embezzlement under the 75th section of the Criminal Code. It is that for which he was indicted and convicted, and it is the offence defined by the statute.

It is to be observed that the statutes of this state defining the crime of embezzlement is much more comprehensive than any English statutes on the same subject that we have examined, and especially that section which defines embezzlement by a clerk or confidential agent, who converts to his own use funds belonging to his employer, which may come to his possession or under his care by virtue of his employment, and the decisions of the English courts, construing their own statutes, do not in any way assist to a correct understanding of the statutes of this state on the same subject.

Much of what is said by text writers, to which the attention of the court has been called, was said with reference to English statutes, which are materially different from that section of the statute of this state under which defendant was indicted. On account of the dissimilarity of the statutes, it has not been thought necessary to remark upon English embezzlement statutes, nor upon the decisions of English courts construing them. Decisions have been rendered by courts of some of our sister states, construing statutes substantially like section 75 of the Criminal Code of this state, that makes the embezzlement of money or personal goods, larceny, among which are The People v. Sherman, 10 Wend., 299; The People v. Dalton, 15 Wend., 581, and Lowenthal v. The People, 32 Ala., 589.

So much of the reasoning in the opinions in the cases cited, as is applicable to the present decision, may be read as being in harmony with the views expressed in this opinion.

No error affecting the merits of the case appearing in the record, the judgment is affirmed.

Judgment affirmed.

NOTE.—If a merchant's or banker's clerk have access to the money room upon special occasion, or be sent to the drawer for money for a special purpose; or if he be sent to bring money generally out of the drawer; and at the time he take the opportunity of purloining money for his own use; he is as much guilty of felony as if he had no allowed access to it whatever. This was not denied in Bazely's case, and therefore needed not the aid of the stat. 39, Geo. 3, c. 85; 2d, East's P. C., 683.

THE UNITED STATES v. FRANK L. TAINTOR.

(11 Blatchford, 374, 2d U. S. Circuit, 1873.)

EMBEZZLEMENT.—The defendant, who was cashier of the Atlantic National Bank, was indicted under the 55th section of the national banking act of June 3, 1864, (13 U. S. Statute at Large, 116), for embezzling, abstracting, and wilfully misapplying the moneys and funds of said bank, with intent to injure and defraud the association. The indictment contained numerous counts designed to cover numerous distinct transactions, and the several transactions were, by means of distinct counts, charged as embezzlements, abstractions and misapplications. On the trial, evidence was given to show that the defendant took money and funds of the bank, and used them in stock speculations carried on in his own name, by depositing the same with a stockbroker, as margins. The defendant offered evidence to show that his acts were known to the president and some of the directors of the bank, and were sanctioned by them, and that all his dealings with the funds was intended for the account and benefit of the bank, and were believed by him to have been sanctioned by the president and some of the directors. The evidence offered by the defendant was excluded: Held that no error was committed in rejecting the evidence offered by default.

Before Woodruff, Benedict and Blatchford, j j., Southern District of New York, November 22, 1873.

The defendant was indicted under the 55th section of the national banking act of June 3, 1864, (13, U. S. Statute at Large, 116), for embezzling, abstracting, and wilfully misapplying the moneys and funds of the Atlantic National Bank, of which he was cashier, with intent to injure and defraud the association. The indictment contained numerous counts designed to cover numerous distinct transactions, and the several transactions were by means of distinct counts charged as embezzlements, abstractions and misapplications. It was also averred, that the acts were done to injure and defraud the association. On the trial, evidence was given to show that the defendant took moneys and funds of the bank, and used them in stock speculations carried on in his own name, by depositing the same with a stock-broker as margins for stock bought, on his account, which were to be held by the broker subject to his order. The defendant offered to prove that his acts were known to the president and some of the directors of the bank, and were sanctioned by them, and that all his dealings with the funds of the bank, as charged in the indictment, were intended for the account and benefit of the bank, and were believed by him to have been sanctioned by the president and some of the directors, although there was no resolution of the board of directors authorizing or sanctioning the same. These offers were made only to disprove the averments in the indictment, that the acts were done with intent to injure and defraud the association. The evidence offered by the defendant was excluded, and the suggestion being made by the court that in case the defendant should be advised to move for a new trial, to test the correctness of the ruling, Judges Woodruff and Blatchford would be requested to take part in the hearing of such motion, a motion for a new trial was accordingly made and heard by the three judges.

George Bliss (District Attorney), for the United States.

A. Okey Hall and James C. Carter, for the defendant.

BENEDICT, J. The ruling called in question upon this motion involved two propositions, namely, that the guilty intent

charged in the indictment was shown by the proof of the act done by the defendant; and, further, that the facts offered to be proved by the defendant would not, in law, avail to negative that intent. It has hardly been doubted, upon this motion, that the first of these propositions is correct. The correctness of the second is strenuously denied, and is now to be determined.

It is a general rule of law, that a man must be held to intend the necessary consequences of his acts. This rule is applicable as well to cases of crime as in civil cases; for, whatever proves intent anywhere proves it everywhere. It has often been so applied. Furthermore, in certain cases, and these criminal, the proof of guilty intent afforded by evidence of acts knowingly done, has been held to be conclusive, and not overthrown by proof of any other facts; and this class of cases has not been limited to acts *mala in se*, nor to crimes at common law. On this argument, it was conceded that, by virtue of the rule in question, the guilty intent is conclusively shown by proof of the act done, where the nature of the act is such that a general guilty intent is so clearly manifested thereby as to admit of no question. It appears to us, that the rule, even thus limited, covers the present case, and justifies the decision made at the trial. For the acts done by the defendant was clearly unlawful, and he is precluded from denying knowledge that it was so. He was an officer of an association created under a statute which does not permit any person to make such use of the funds of the association as was here made. Furthermore, the acts of the defendant rendered the association liable to a forfeiture of its charter. Still further, it cast upon the bank a risk which attached at the instant of the doing of the act, and this a risk notoriously great, extraordinary in character, and outside the bounds of proper commercial use. It placed the capital of the bank beyond the control of the officers of the association, and it was an unlawful dealing with the money of a corporation, belonging to a class of institutions whose welfare is intimately connected with the public welfare, which are liable to be depositaries of the public moneys, and which cannot justly be considered to be merely private pecuniary trusts. The acts

of the defendant, therefore, necessarily involved injury, not only to the association, but also, in a proper sense to the public. An act having such characteristics, and involving such consequences, when knowingly done, discloses moral turpitude, and cannot be innocent. It may, therefore, well be held that proof of such an act proves conclusively an intent to injure, because, when knowingly done, it affords no opportunity for justification or legal excuse, and manifests so clearly a general guilty intent, as to make it of no consequence what other particular intent co-existed therewith, and to preclude inquiry as to such other intent, or into the motives which impelled to its commission. A generous motive is not inconsistent with a guilty intent, and proof of the one does not disprove the other. Our opinion, therefore, is that the circumstances offered to be proved by the defendant, would not tend to disprove the guilty intent charged in the indictment.

But it is contended that the phraseology of the statute under which the indictment is framed, requires proof of something more than the general guilty intent necessarily involved in such a misapplication of the funds of a national bank, inasmuch as it couples with the words "embezzle, abstract, and wilfully misapply," the words "with intent to injure or defraud the association," and thus requires the presence of a corrupt motive, a design to cheat the association out of money, in order to constitute the offence. It is necessary to determine whether the latter words, as here used, are intended to be taken in connection with the words "embezzle, abstract, or wilfully misapply," because this has been assumed by the prosecution, and the indictment, in each count, charges an intent to injure and defraud the association. The question presented, therefore, is as to the effect produced upon the words "embezzle, abstract, or wilfully misapply," by the addition of the words "with intent to injure or defraud the association."

In considering this phraseology, it will be noticed, that, while the word "embezzle," and, perhaps, also, the word "abstract," refers to acts done for the benefit of the actor as against the bank, the word "misapply" covers acts having no relation to the pecuniary profit or advantage of the doer there-

of. A design to make criminal acts done without reference to personal advantage, is thus clearly disclosed, and it appears that the intention of the statute was to cover cases of unlawful dealing with the funds of the bank by its officers, although without a corrupt motive. This intention, manifested by the insertion of an emphatic and significant term in the commencement of the section, it cannot be supposed was intended to be defeated by the subsequent use of the words, "with intent to injure or defraud." Nor can such effect be given these words without treating the word "injure" as synonymous with "defraud," and as referring to a misapplication for the benefit of the doer. But, if the signification of the word "defraud" be limited to a malicious dealing with property for the personal advantage of the doer, and it is not always to be limited, the word "injure" is not of such limited application, and was doubtless inserted to cover cases of misapplication causing injury to the association, without benefit to the offender. The guilty intent required by the statute would, therefore, still exist, although it be shown that no personal pecuniary benefit was anticipated by the defendant, and the requirement of the statute is fulfilled by the defendant, and the requirement of the statute is fulfilled by proof of general guilty intent involved in the act, knowingly committed.

The phrase "intent to injure or defraud" is the same one used in indictments for forgery. There it refers to a general guilty intent, and such indictments are held conclusively proved when the act is proved to have been knowingly committed. The phrase should be considered to have the same meaning in this statute, and to be proved in the same way. Nor does this construction render the words nugatory. On the contrary, they are given precisely the same effect which they are held to have in indictments where their presence has been considered to be necessary. A similar effect has been given in the same phrase in other statutes. Thus Lord Ch. J. Tindal has observed, that "where a statute directs that, to complete an offence, it must have been done with an intent to injure or defraud any person, there is no occasion that any malice or ill-will should subsist against the person whose pro-

perty is so destroyed. It is a malicious act in contemplation of law when a man wilfully does that which is illegal, and which in its necessary consequence, must injure his neighbor." 5 C. & P., 266, note; 2 Russ. on Crimes, p. 575; Com. v. Snelling, 15 Pick, 340. It is, indeed, true, that this construction of the statute under consideration, imputes to the legislature the policy of making some acts criminal which may not have been before classed as crimes; and if, as it seems to be here suggested, the moral sense of the business community has become so blunted that such acts as this defendant is conceded to have committed have come to be considered "innocent, or even praiseworthy," the urgent need of the adoption of such a policy affords good ground for supposing that its adoption was intended by the statute.

Our opinion, therefore, is, that no error was committed in rejecting the evidence offered by the defence upon the trial of this cause, and the motion for a new trial must, accordingly be denied.

NOTE.—In State v. Leicham, 41 Wis., 565. The defendant entered into a contract in writing between himself and the firm of Van Brunt, Barber & Co., whereby the firm appointed defendant its agent to sell its seeders, on the terms and conditions, and under the restrictions therein specified. The defendant accepting and agreeing to fulfill, and observe such terms.

A large number of seeders were shipped by Van Brunt, Barber & Co. to the defendant, pursuant to the contract. The defendant, being pressed for money, after some hesitation, sold to one Myers three of the seeders received by him, for the purpose of getting money. Myers paid him $130 in cash. The defendant stipulated with Myers that he might purchase back the seeders by paying the $130, and tried to stipulate (but without success) that Myers should not remove the seeders. These transactions were without the consent and knowledge of Van Brunt, Barber & Co., and the defendant never accounted to them for the seeders sold to Myers.

The following instructions were refused:

"If you find, from the evidence, that at the time of making the bill of sale the defendant intended and expected to be able to pay for the same to the company when his general settlement should be made, and that he acted in good faith and with no criminal intent, you should not find him guilty.

"If you find that the defendant so construed the written contract that he honestly supposed that he had the right to sell the machines and use the proceeds thereof, and afterwards account to the company, and that in

the transaction in question he acted under that impression and in good faith, you should not find him guilty.

"The evidence shows that the defendant was not such an agent of the company as is intended by the statute under which the charge is made. I therefore charge you that there is no evidence sufficient to convict the defendant."

The following instructions were given:

"It is not enough to constitute the offence charged, that the defendant was the agent of the company, and that he converted the property to his own use; but the evidence must show that the property was fraudulently converted to his own use, or converted with the intent to embezzle.

"If you entertain any reasonable doubt as to whether the defendant intended to defraud the company, he is entitled to the benefit of the doubt.

"Under the written contract, which has been read in evidence, and which it is the duty of the judge to construe, the defendant was, at the time of the alleged embezzlement, the agent of Van Brunt, Barber & Co., for the sale of machines mentioned in the contract, and for receiving and passing over the consideration, whether in notes or money, to the said company.

"If at the time, or before it, he received machines under the contract and held them for sale, he was bound by his contract to sell them according to the terms of such contract, for money or notes, which were the property of said company.

"It is for you to find whether or not he had received and had on hand, at the time of the alleged embezzlement, the machines in question. If you find he had not, and should find that he sold any of them for the purpose of paying an indebtedness of his own, or pledged or turned them out as security for the purpose of raising money to pay his own indebtedness, without the consent of his principals, it was an unauthorized and fraudulent use of them, or an embezzlement and fraudulent conversion of such as were so used to his own use. And if you find that he did so while the property was in his possession, he is guilty as charged in the first count of the information.

"It would not relieve him from guilt if he intended and expected, at the time of doing so, to pay his principal for them with other money or property, or to repurchase or redeem them of the party to whom they were sold or mortgaged, or to repay the money to the party to whom they were turned out or pledged as security."

Lyon J., said: "The foregoing facts are proved by the uncontroverted evidence, and are absolute verities in the case. That they show a fraudulent conversion by the defendant, to his own use, of the property described in the information, cannot be doubted. And it is equally clear that such property came to the possession of the defendant, and was under his care, by virtue of his employment as agent of the owners for the sale thereof. Moreover, there is no room in the case for the theory that the defendant supposed he had the right, under his contract with the owners, to convert the property to his own use, and he cannot urge, in jus-

tification of his conduct, that he construed the contract as giving him the right, and hence converted the property in good faith. He knew that he had the property as agent for the owners, by virtue of his employment as such, and he converted it to his own use without the consent of the owners, and, as he well knew, in violation of his duty.

"There is nothing in the evidence that tends to show that he acted innocently; nothing which enables us to say that perhaps he did not understand the nature of his acts, and may not have intended to commit a crime. We are compelled to believe that he converted the property to his own use with full knowledge of the quality of the act, and the possible consequences.

"Neither does the fact (if it be a fact) that the defendant believed, when he converted the seeders to his own use, that he would be able to pay the owners for them when required to account for them, and intended to do so, remove from the act of conversion its fraudulent and criminal character. The fraud and crime inhere in the act, and were not eliminated therefrom by any mere mental process, however amiable or virtuous it may have been.

"The instructions given and refused must, of course, be considered in the light of the evidence and of the undisputed facts in the case; and, this considered, we fail to find any error in that behalf of which the defendant can justly complain. Indeed, we think the jury were, in some particulars, instructed more favorably to him than the facts of the case warranted."

Exceptions overruled.

S. T. GADDY v. THE STATE.

(8 Tex., Ct. of App., 127.)

EMBEZZLEMENT.

Appeal from the District Court of Dallas.

The indictment alleges that the defendant, " being then and there the bailee, and in possession of a certain gelding, said gelding being then and there the corporal personal property of one John H. Goble, and of the value of $30, which said gelding the said Goble, prior thereto, to wit, on the 30th day of March, A. D. 1879, did intrust to the said S. T. Gaddy, as bailee, to be by him, the said Gaddy, taken from the residence of said Goble, in Denton county, to the city of Dallas, and back from the said city of Dallas to the residence of him, the said Goble, he, the said Gaddy, did then and there, to wit, in the county of Dallas and state of Texas, on the 1st day of March, 1879, did fraudulently and feloniously convert to his own use the said gelding, without the consent of the said Goble, and with the fraudulent and felonious intent of him, the said Gaddy, to deprive the owner of the said gelding and appropriate the same to the use and benefit of him, the said Gaddy; contrary," etc.

The jury found the appellant guilty, and assessed his punishment at two years in the penitentiary.

White, P. J. The indictment in this case purports to charge appellant with embezzlement, the embezzlement consisting in the fact that, as bailee, he had fraudulently converted to his own use a borrowed horse.

"A loan for use, called in the civil law *commodatum*, is a bailment to be used by the bailee temporarily, or for a certain time, without reward, * * * and if a horse be gratuitously lent for a journey, it is a case of *commodatum*." Story on Bail, sect. 6; 2 Pars. on Con. (5th ed.), 108.

Our statute concerning the offence makes it applicable to any bailee of property who fraudulently misapplies or converts to his own use, without the consent of his employer, any property which shall have come into his possession or shall be under his care by virtue of his employment. Gen. Laws 15th Leg., p. 9, "An act to amend art. 771 of the Penal Code;" Rev. Pen. Code, art. 786.

The indictment is defective in that it does not allege by direct averments that at the time of the conversion the animal was in the possession of the defendant by virtue of his agency or of the bailment. "An indictment upon a statute must state all such facts and circumstances as constitute the statute offence, so as to bring the party indicted precisely within the provisions of the statute. 7 Chitty's Cr. Law (ed. of 1841), 281–283; Archb. Cr. Pr. & Pl. (ed. of 1846), 50. If the statute is confined to certain classes of persons, or to acts done at some particular time or place, the indictment must show that the party indicted, and the time and place where the alleged criminal acts were perpetrated, were such as to bring the supposed offence directly within the statute." The People v. Allen, 5 Denio, 76. "The facts and circumstances which are necessary to constitute a complete offence must be stated with distinctness and certainty." The People v. Poggi, 19 Cal., 600.

An indictment for this offence was held bad by our supreme court. The State v. Johnson, 21 Texas, 775, because it did not distinctly state that the defendant had the posses-

sion or care of the money by virtue of his clerkship, when he converted it to his own use. Such allegation is required by all the standard precedents. 1 Whart. on Prec. of Indict. (3d ed.), 466–469. See also The State v. Longworth, 41 Tex., 162; Gibbs v. The State, 41 Tex., 491; Baker v. The State, 6 Tex. Ct. App., 344.

Because the indictment is insufficient in law, the judgment is reversed, and the cause remanded.

Reversed and remanded.

STATE v. FOSTER.

(37 Iowa, 404.)

EMBEZZLEMENT.—The prosecutor gave the prisoner a watch, which the prisoner, as agent for the prosecutor, was to trade for a wagon when he could find a suitable opportunity, and for which service the prosecutor was to pay the prisoner $5.00, shows the relation of agency existing between the accused and prosecutor, sufficient to sustain a prosecution for embezzlement, in converting the watch to his own use.

The state gave evidence that the watch was worth $95.00, which was not contradicted by the prisoner. After trial it was shown by affidavit that the watch was of base metal, and only of the value of $10 or $15. No fault or negligence for not offering this evidence on the trial being attributed to defendant, a new trial was granted.

BECK, C. J. 1. The second count of the indictment upon which the defendant was convicted charged that he, being

" the servant and agent of one P. B. Furlong, and being over the age of sixteen years, did . . . by virtue of his said employment, have, receive, and take into his possession and under his control, one watch, of the value of $95, the property . . . of P. B. Furlong, his employer, ... and the said watch . . . . without the consent of his said employer, did feloniously embezzle and fraudulently convert to his own use." The statute upon which this indictment was found, is as follows:

" If any officer, agent, clerk or servant, or any incorporated company; or, if any clerk, agent or servant of a copartnership, or if any person over the age of sixteen years, embezzle and fraudulently convert to his own use, or take and secret, with intent to convert to his own use, without the consent of his employer or master, any money or property of another, which has come to his possession, or is under his care by virtue of such employment, he is guilty of larceny, and shall be punished accordingly." Rev. Stat., § 4244. There was evidence tending to prove that, by an agreement between Furlong and the defendant, the latter undertook, in consideration of $5, to be paid him by the former, to trade a watch, the property of the former, for a wagon. Defendant was to find some one owning a wagon, who would trade it for a watch, and make the exchange for Furlong. Under this agreement the watch was delivered to the defendant, who failed to make the trade, and converted the watch to his own use. The court instructed the jury upon this evidence as follows:

" 7. If you find that Furlong and the accused made an agreement whereby the accused contracted to receive the watch and trade it for a two-horse wagon for Furlong, for which he was to receive a compensation of $5, this is sufficient to sustain the averments that the defendant was in the employment of said Furlong, and that he received the watch by virtue of this employment."

It is insisted that this instruction, and the view of the case upon which it is based, are erroneous, inasmuch as no such relation, or employment, is shown to have existed between the accused and Furlong, as is a necessary ingredient of the crime of embezzlement, under the statutes.

It is insisted, in a very able argument by defendant's counsel, that the transaction between the parties, disclosed by the evidence and contemplated by the instructions of the court, constitutes an ordinary bailment, and could not, therefore, be the foundation of the crime of embezzlement.

It may be suggested, before proceeding to the discussion of the question presented, that the authorities cited, and others we have been able to consult, throw little light upon the subject, from the fact that they interpret, and apply to, statutes not entirely similar to the law of this state under which the indictment was found. Upon the construction of this enactment depends the solution of the question before us. Its language necessary to be interpretated, correcting the obvious typographical error found therein, is this: "If any person over the age of sixteen years embezzle and fraudulently convert to his own use, ... without the consent of his employer or master, any money or property of another which has come to his possession, or is under his care by virtue of his employment, he is guilty," etc.

The words indicating the relation that must exist between the accused and another, which is a necessary ingredient of the offence, are "employer," "master," "employment." We will, without notice of the word "master," consider the term "employer" and "employment." They are not of the technical language of the law, or of any science, or pursuit, and must therefore be construed according to the context and the approved usage of the language. Rev. Stat., § 29, p. 2.

The words are defined as follows: Employment—"the act of employing or using. 2, Occupation, business. 3, Agency or service for another, or for the public. Employer—one who employs; one who engages or keeps in service."

The verb "employ" is defined as follows, when used with a human being either as its subject or object: To engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs."—Webster.

It will be seen from the definition of these words that the statute contemplates the relation of agent, a contract for ser-

vices, whereby the accused is bound to do or perform something in connection with the property embezzled, and that by virtue of such relation he acquired possession thereof. It by no means appears that the idea of bailment, or bailee, is excluded from these definitions, but without following the thought or relying upon it, we will inquire whether the evidence establishes a relation of agency or service existing between the accused and Furlong, and whether such relation is contemplated by the instructions above quoted. We think it is in each. The watch was received under an agreement that the accused was to act for Furlong in making a contract of sale of the property, *i. e.*, exchanging the watch for a wagon. Can it be doubted that any proper contract of sale within the scope of the accused's authority would have bound Furlong? Certainly, he would have been bound thereby; and one of the ingredients of the transaction creating it a binding contract upon him would have been the relation of agency existing between him and the accused. We conclude that the idea of agency is clearly expressed, both by the language of the indictment and instructions, and the relation is established by the evidence, or rather that there was evidence tending to establish it rendering the instruction relevant and proper, upon which the jury may well have found its existence.

We, therefore, find no error upon this point in the rulings of the court upon the instructions and the motion assailing the indictment, because the facts alleged do not constitute an offence under the statute. See upon this point 2 Whart, Am. Crim. Law, § 1936; The People v. Dalton, 15 Wend., 581; 3 Arch. Crim. Prac. and Pl., 450, 444 and notes.

A motion for a new trial because of newly discovered evidence was overruled. We think it should have been sustained.

Evidence as to the character of the watch and its value, showing it to be worth $95, was given by the state. No evidence upon this point was introduced by the accused. His own affidavit and that of his counsel, we think, show the fact that they were not in possession, at the time of the trial, of the names of any witnesses by whom the evidence on the part of the state, as to the value and character of the property,

could have been contradicted. It is shown by the affidavit of these witnesses that the watch is of base metal and only of the value of $10 or $15. It does not appear that any fault or negligence can be properly attributed to defendant or his counsel in not introducing the evidence of these, or of other witnesses, upon the point at the trial; in fact, the showing made is such that we must conclude that they were unable, from ignorance of the names of the witnesses, to do so.

The attorney general suggests that the evidence claimed to be newly discovered is but cumulative, on the ground that one of the witnesses of the state does not give as high a description of the character of the watch as the prosecuting witness. But nothing was said by him as to its value, and defendant's counsel, in the exercise of proper prudence, may well have feared to venture upon an attempt to establish a point in the defence by one of the state's witnesses.

The importance of the evidence cannot be questioned, for it is upon a fact which, if established, would reduce the offence from a felony to a misdemeanor.

For the error of the district court in overruling the motion for a new trial, on the ground of newly discovered evidence, the judgment is reversed.

Judgment reversed.

THE PEOPLE v. DALTON.

(15 Wend., 581.)

EMBEZZLEMENT.

Mrs. Mann kept an inn at Geneva; the principal management of the house was in one Franklin. A traveler who stopped at the inn gave Franklin a letter containing a ten-dollar bill, informing him of its contents and requesting him to send it to the post-office. Franklin delivered the letter to Dalton, a *bar-keeper* in the house, to carry to the postoffice, who took it, but did not deliver it at the post-office. It was customary in the house for the bar keeper to take letters to and bring them from the post-office. Mrs. Mann had no knowledge of the custom, nor of the particular transaction. The court was requested to instruct the jury to acquit the prisoner on the ground that the offence as proved did not amount to the crime of embezzlement, which request was refused, to which refusal the counsel for the prisoner excepted. The jury returned a verdict of guilty. After verdict, the prisoner's counsel moved *in arrest* of *judgment*, raising four distinct objections, all of which related to the evidence, and were founded on its insufficiency to establish the offence charged. The motion in arrest of judgment was denied, and the judges thereupon sealed a bill of exception, which was brought into this court by certiorari.

The case was submitted on written arguments.

N. Parker for the prisoner.

W. Hubbell (district attorney of Ontario) for the people.

By the court, Cowen, J. The exception taken to the omission of the court to charge the jury that the offence as proved did not amount to the crime of *embezzlement*, seeks to draw the *whole case* in question, and is perhaps too broad to raise in proper form any point presented by the argument; but if it were in due form, the objection cannot avail. The statute is, that if any servant of any private person, etc., shall embezzle or convert to his own use, without the assent of his master or employer, any money, etc., which shall have come into his possession, or under his care, by virtue of his employment, he shall be punished in the same manner as a larcener of the like sum. 2 R. S. 678, § 59. It is contended for the prisoner that, to show an embezzlement or conversion within the statute, there must have been proof of breaking or opening the letter, or of flight, etc. It is perfectly clear that neither is necessary. A fraudulent conversion in any way is enough; and there is no prescribed set of circumstances by which the fraud is to be made out. There is nothing in the objection that this conversion could be said to have been "without the assent of his master," on the ground that Mrs. Mann had no actual personal knowledge that the prisoner was ever employed in carrying letters; it is enough that she, in truth, gave no assent. That she gave any is not pretended; and it is obvious from the evidence that she knew nothing of the matter. The statute is "without the assent," etc., not *without the dissent*. The point presented seems to suppose some act of the master or mistress's mind necessary, or at least possible, in respect to the crime. It is also objected that the letter did not come to the prisoner's possession by virtue of his employment, within the meaning of the statute. The contrary is clear. People v. Sherman, 10 Wend., 278. It is said, under this point, that Mrs. Mann had no knowledge of his ever being entrusted to carry letters. The answer is that Franklin, her

general manager and agent, had so employed him. This was in effect her act; and his knowledge was constructively her knowledge. The point made, that a felonious or criminal intent must be proved, is assented to by the district attorney, who properly insists that proof of a fraudulent conversion is establishing the felonious or criminal intent within the objections raised. Such conversion was abundantly shown. In short, the offence, as proved, is exactly within the statute. It is intended to provide for a fraudulent conversion of money or goods by a servant, when they are delivered to him as such, either by his master or mistress, or in their behalf, or by a stranger. That was but a breach of trust at common law, because the money or goods came to his hands by delivery. The statute intended to convert such a breach of trust into a crime.

As to the *motion in arrest* and the judgment of the sessions thereupon, there are two answers: 1. The matter is not properly here—a bill of exceptions can be taken only at the trial; and 2. Had the objections been properly raised and properly brought here, there is nothing in them. As to the first ground: a writ of error at common law could not reach any objection arising *dehors* the record, unless perhaps in the single case of diminution, or error in fact. For the right now so commonly exercised, of bring up the merits from the trial by writ of error we are indebted to the state, 1 R. L. of 1813, p. 326, § 6. It was brought down from the previous revisions, and is almost an exact transcript from the old English statute of 13 Edw. 1, of *Westminster* 2, ch. 31, Sec. 1, Statutes at large, 190. Under this statute the exception was confined in practice not only to the trial, but almost exclusively to some point of law specifically raised there upon the evidence, or the charge of the judge. The present revised statutes seem, through inadvertence, or otherwise, to have omitted this old statute. They begin by assuming that there is such a statute, or something equivalent in the common law, and make full provision in respect to the practice of taking and disposing of the bills, 2 R. S., 422, § 73 to 80, inclusive. The introductory language, however, fully recognizes the settled notion so long entertained while the old statute was in existence, that the tak-

ing of the bill was confined to the trial. That language will be found in section 73, and is thus: "In all cases where exceptions are allowed by law, *on the trial of any cause*, either party may make such exceptions *at the time of the decision complained* of, etc. Exceptions in criminal cases are co-extensive as to subject matter, and no more, with those in civil cases, but are confined to the defendant, 2 R. S., 736. They were given in such cases, for the first time, by the present revised statutes, which provide that, on *the trial* of any indictment, exceptions to the decision of any court may be made by the defendant, in the same cases and manner provided by law in civil cases, etc. The statute then proceeds with some regulations adapting the bill to the peculiar forms of practice in criminal cases, 2 R. S., 736, § 21 to 27, inclusive. In no sense, then, with or without the old statutes, can we notice as a matter for a bill of exceptions, a motion made as this was said to be, in arrest of judgment, but which was, in truth, a motion for a new trial, in an inferior court, introduced in the name of a motion in arrest. That court had no power to entertain a motion for a new trial. An inferior court of record may arrest the judgment, or under a judgment *non obstante verdicto*; but they cannot, without a special statute power, grant a new trial on the merits. The former is always founded on the record—the latter on the proceedings at a trial regularly brought on; of course, the restriction can not be voided by misnaming the latter a motion in arrest. Such matter ought not to be put into a bill of exceptions. But had the objections been properly raised and properly brought here on error, we should be obliged to disregard them, because they were unfounded.

In any and every view, the court below were right in overruling what was miscalled the motion in arrest. The true course would have been to have disregarded it for want of jurisdiction. I ought not to let this occasion pass without noticing that the office of the bill of exceptions has been here entirely mistaken in several particulars. First, the testimony of the people is detailed with great particularity, as if we were to judge of its weight and effect in establishing the leading facts on which all the questions of law were supposed to turn.

There was no dispute about several of the main facts. When this is so, they should be stated succinctly, as the effect of the proof. Denison v. Seymour, 5 Wendell, 103. So, if there be a plain defect in the proof, which defect is the foundation of the point raised, that can be mentioned. If the point is to be made that the proof is legally sufficient to establish a fact assumed by the court, and put by them, as proved, to the jury, more details are warrantable; and so if it be a question whether there be proof sufficient to carry the cause to the jury; but unless the facts relate to some legal exception properly taken at the trial, even the statement of them in the charge to the jury, and the commentaries upon the evidence made by the judge, may—nay, should be stricken out on settling the bill. Ex parte Crane, 5 Peters, 190, 197 to 200.

Had the points been distinctly raised at the trial as they are now presented in argument, the bill might have been somewhat abridged in its history of the people's case; though I admit not a great deal, if we allow full effect to the exceptions as taken, and hold the points to be all properly involved in the general motion made at the trial for instructions to acquit A general objection to the latter kind, however, is hardly ever available in a bill. An objection usually arises when the main facts are made out in proof, but there is some particular defect relied upon by counsel. This they are required to point out, because it may, on being mentioned, be at once obviated by further proof. In this case, had the defects now mentioned, that the prisoner's *flight* was not proved, been objected, and thought material, it might, for aught we know, have been shown. So the want of personal knowledge in Mrs. Mann, that the prisoner was in the habit of carrying letters, and that he took this particular letter. So that a criminal intent was not shown, etc. It is extremely unsafe to allow this broad objection, founded on the whole case, as made at the trial, to be available here for the purpose of any specifications that the party may choose to make for the first time. Some material facts which was, in truth, proved at the trial, is many times omitted in the case, for the very reason that it appeared, and no objection was made. The true and the only course, in correct practice, is in the manner pointed out, to

draw the mind of the court and opposite counsel to that part of the case wherein the objection lies, and then let the bill furnish such evidence, or such want of evidence, as may be material to the objection; exhibiting the whole as briefly as may be warrantable for a full understanding of the legal point. Denison v. Seymour, 5 Wendell, 103. The whole case, at least the whole evidence, can be rarely wanted in a bill of exceptions properly taken. Whitside v. Jackson, 1 Wendell, 418. The presenting of the points is, of course, the particular office of the counsel; and if these be broad and indefinite, covering the whole case, it is seldom that the court below feels willing to disregard them, though obviously ill taken. They, therefore, go up with the writ of error, in their general shape, and a statement of facts fails in what might otherwise have been most material, for the very reason that it seeks too much. I must not be considered as allowing that there is, properly, an available exception in the bill now before us, though I have considered the specifications as they have been raised in argument. Even if there had been good ground of exception shown to us, I should have feared its failure, upon the manner in which the questions are presented. Aside from these, no other point of law, nor anything resembling it, was raised at the trial. The charge of the court was quite favorable to the prisoner; and, of course, no exception to that was thought of: yet all the testimony on the side of the prisoner, directed exclusively to his character, and the credibility of one of the people's witnesses is detailed. It was, obviously, useless for all the purposes of the bill, and should have been excluded in the settlement of it. Then comes what are called the proceedings on the motion in arrest, the utter irrelevancy of which I have before considered.

I am aware of the great difficulty of courts below in trimming the case down to the neat point which should always, if possible, be presented. There is a frequent anxiety on the part of counsel to place every thing in a bill which is at all favorable to their clients in any view, and between the fear of making the case come short of what it should be, and the great respect so properly entertained for the zeal of counsel, and the real indulgence due to them in the exercise of their arduous

and useful office, there is every tendency to relaxation. In settling many of these bills myself, with a full understanding, as I thought, of the general rules upon which it should be done, I have yet constantly felt the difficulty of their application, from the causes mentioned, and others inherent in this branch of judicial business. I am, therefore, far from speaking in a spirit of censure, when I notice the irrelevant matter which has found its way into this bill. The whole occupies no very great space, and is least of all attributable to a desire in any one concerned to swell folios for the sake of fees. But it can be seen how easily the practice may be abused to a very inconvenient, not to say an oppressive extent, if the courts, who are to settle these bills, prefer leaving matter to stand, where there is a mere doubt of its relevancy, when it is their duty to repress every attempt at obvious redundency. In the court of review the line of duty is plain. Exceptions not properly presented cannot be regarded, even in criminal cases, 2 Chit. Gen. Pr., 593, and cases there cited in note (e); and useless prolixity should be discouraged in every department of legal practice.

The sessions are advised to sentence the prisoner, if they have not already done so.

NOTE.—The court seemed to have a better knowledge of the theory of the law than of the law itself. The proposition that the statute "intended to convert a breach of trust into a crime," is quite correct; but the proposition that the charge against Dalton was but a "breach of trust at common law" is very erroneous. Dalton was intrusted with the *custody* of the goods and not with the *possession to keep*; therefore the conversion was larceny at common law.

See R. V. Lavander, Post.
R. V. Paradice, Post.
R. V. Bazely, Ante, 14.
Com. v. Berry, Post.
Warmoth v. Com., Post.

CARTER VS. STATE.

(53 Ga., 326.)

EMBEZZLEMENT.—An indictment for larceny by bailee must set forth the character of the bailment.

The defendant was intrusted by one John Mongin with four hundred and eighty melons of the value of ten cents each, for the purpose of applying the same to the use of the said Mongin.

After having been so intrusted he failed to apply the melons as directed, but without the owner's consent appropriated the same to his own use.

The jury found defendant guilty.

The defendant moved for a new trial, because the verdict was contrary to the law and the evidence. The motion was overruled and defendant excepted.

TRIPPE, J. The statute makes the fraudulent conversion by a bailee of many kinds of property a criminal act, to wit: money, notes, bonds, cotton, corn, horses, mules, etc. If the indictment charged that the defendant was intrusted with money, or a horse, which he fraudulently converted, it could not be sustained by proof that a bond, or cotton, had been so intrusted and converted. So the same statute, code, sec. 4424,

prescribes that when such things or articles have been intrusted to a person for divers different purposes, to be used by him in various specified ways therein defined, and the bailee shall fraudulently convert them to his own use, or otherwise dispose of them, he shall, on conviction, be punished.

It is as much necessary that the character of the bailment, the purpose for which the thing is intrusted, shall be set forth in the indictment, as it is properly to describe the thing or *article* itself. In both cases the rule is found on the right of a party to have notice of what it is proposed to convict him. We do not suppose that any indictment under this statute ever failed to define both, to wit: the article deposited, and the nature or object of the bailment. Each of them is set forth in the one under consideration. The bailment therein defined is, that the melons were intrusted by the owner with the defendant "for the purpose of applying the same to the sole use and benefit of the said owner." The proof was, that they were delivered to the defendant for the purpose of selling the same, and after the defendant was satisfied out of the proceeds of sale for his services, the surplus was to be paid to the owner. When the bailee is charged with a trust to be executed in a special mode, distinctly defined when it is created, and is to be brought to account for an alleged breach thereof, either civil or criminally, he should be notified in the suit or criminal accusation, of what *trust* it is claimed he has been guilty of violating. We think justice and reason demand this, and that it is but preserving a vital rule that obtains in all pleadings, civil or criminal.

Judgment reversed.

RESIDE v. THE STATE.

(10 Texas, Ct. App., 675.)

EMBEZZLEMENT.—The value of the property embezzled must be alleged in the indictment.

"Eight dollars in money consisting of one five-dollar bill, one two-dollar bill, and one one-dollar bill circulating medium current as money" is not sufficient.

WINKLER, J. The information charges the defendant with embezzlement, as follows: "That on, to wit: the 10th day of March, A. D. 1879, in the county of Parker and state of Texas, Jack Reside, who was then and there the bailee of eight dollars in money, consisting of one five-dollar bill, one two-dollar bill and one one-dollar bill, all of which was then and there a circulating medium current as money, a more particular description of which cannot be given, and all then and there the property of Alonzo Hunt, did then and there embezzle, fraudulently misapply, and convert to his own use said money, without the consent of said Alonzo Hunt, who had then and there entrusted said money to said Jack Reside to be by him conveyed to Forth Worth, Texas, for him the said Alonzo Hunt, and which said money had then and there come to the possession of said Reside, and was then and there

under his care, by virtue of said bailment as aforesaid: against," etc.

Without attempting to criticise the information in other respects, we are of the opinion it is defective and insufficient to support a judgment of conviction for the crime of embezzlement, in that there is no direct substantive averment of the value of the money charged to have been embezzled. It is true the information charges that the defendant as bailee was entrusted with eight dollars in money, but the pleader goes on to particularize that the money consisted of a five, a two, and a one-dollar bill, but does not state that it is in gold, silver or current paper of the United States or of any other government or country; and whilst it states the denomination of the several bills, there is no attempt made to state the value of said bills or either of them, or that they had any aggregate or separate value whatever. It is not averred even that the bills were genuine.

When a proper charge of embezzlement is made out, the punishment is the same as for theft. Original Penal Code, arts. 771–2. If the defendant in the case under consideration is liable at all, it is believed that his liability must be ascertained under art. 772. It is evidently intended to charge him with having been entrusted with the money in the capacity of a carrier. Now, if any carrier to whom any money, goods, or other property shall be delivered to be carried by him, or if any other person who shall be entrusted with such property, shall embezzle or fraudulently convert to his own use any such money, goods or property, either in mass as the same were delivered, or otherwise, he shall be deemed guilty of theft, not embezzlement, and shall be punished as prescribed for that offence—theft, according to the value of the money, goods or other property so embezzled or converted. Original penal Code, art. 772; Rev. Penal Code, art. 788. Should not the information under this article have been so framed as to charge this defendant as carrier rather than as bailee? But be this as it may, the punishment for embezzlement being the same as for theft, the indictment or information should, as in theft, aver the value of the property or thing embezzled, in order to regulate the punishment. In

theft, except of particular kinds of property, as a horse, where the law fixes a definite punishment without reference to the value, the value must be averred and proved. Theft of property of twenty dollars and over in value is punished by one rule, whilst theft of property in value less than twenty dollars is punished by a different rule altogether.

The information being defective and insufficient, the judgment will be reversed and the prosecution dismissed.

Reversed and dismissed.

PEOPLE v. HUSBAND.

(36 Mich., 306.)

EMBEZZLEMENT.—A claim of right to pledge the property of another, if made in good faith, negatives the fraudulent intent to deprive the owner thereof.

What is a sufficient delivery of goods to grant a prosecution for embezzlement.

MARSTON, J. An information was filed against the respondent, charging him with having fraudulently and feloniously secured and converted to his own use certain trunks and other property of the value of fifty-five dollars, without the consent of the owner thereof, and that he thereby, in manner and form aforesaid, feloniously did steal and carry away the same contrary to the statute, etc.

The statute, under which the information was filed, reads as follows:

"If any person to whom any money, goods, or other property, which may be delivered, shall embezzle or fraudulently

convert to his own use, or shall secrete, with intent to embezzle or fraudulently use such goods, money, or other property, or any part thereof, he shall be deemed, by so doing, to have committed the crime of larceny." *Act No. 168, Laws 1875, vol. 1, p. 195.*

The evidence introduced tended to show that the respondent was a hotel-keeper, and that as such he had received from the complaining witness, who was stopping at his house, three checks, being the checks to her trunks then at the depot, with the request that he bring the trunks to the house; that complainant remained at his house some five weeks; that although she ascertained that her trunks had been removed from the depot, the same had not been brought to the respondent's house; that respondent, in the meantime, had been to Detroit, and on his return she spoke to him about her trunks, when he informed her they had been sent to Detroit, but he would have them back in a day or two.

Evidence was also given that on April 24th, 1876, some eight days after respondent had received the checks, he was in Detroit, and that he then handed the checks to the proprietor of a hotel in that city, who handed them to one of the hotel porters; that respondent then asked the porter to bring the baggage which the check represented to the house, which was done; that respondent left the hotel before the baggage was brought in, and did not return; and that the baggage thus brought into the hotel in Detroit was the trunks and property of the complainant.

The property was afterwards found in the Detroit hotel where it was detained for respondent, for respondent's hotel bill. Other evidence was introduced, but the above is sufficient in order to enable us to understand the questions raised. The respondent was convicted, and the case came here upon exceptions, before sentenced. It is insisted that the property was in the hands of the respondent as bailee; that he had a special property in the goods, and that under such circumstances they were not the subject of larceny; also that the property was never delivered to the respondent; that the checks only were delivered, and that the property remained in the possession of the railroad company.

It is true that the complaining witness did not deliver to the respondent the actual manual possession of the property, but she did deliver to him that which gave him the right to the control and possession of the property, and that, acting upon the authority which she gave him, he assumed the right to it, and did exercise acts of possession and control over it.

The evidence tends to show that the disposition of the property, as made by him, was not only without authority in fact from the owner thereof, but that it was in fact in direct violation of the authority she had given him, and was a conversion of the same to his own use. The fact that she was a guest at his hotel, and that he would have a lien upon this property for the amount she might be owing him, would not give him authority, under the facts appearing in this case, to dispose of the property as his own. His good faith and belief that he had such right would show a want of any criminal or wrong intent, and the jury were so instructed. An examination of the charge shows the case in hand to have been presented to the jury in such a form that the respondent had no legal cause of complaint. They were instructed, in case they found that the respondent had absolute control over the property, by means of the checks, that such would be a sufficient delivery of the possession to him. They were also instructed, that in order to find a conversion, they must find an actual conversion by the respondent to his own use, and also an intent existing at the time of such actual conversion, to thereby deprive the owner of her property therein, and to use it himself—that in case they found an actual possession and actual conversion in Detroit, and that respondent there assumed absolute control over the property, as his own goods, they must also find in order to convict, the intent thereby to deprive the owner of her property therein, absolutely and entirely—that if he had any intent other than this the offence would not be made out. The jury were further instructed, that in case they found he claimed to have a lien upon the goods, and thought he had a right to pledge the goods, by virtue of having such lien, then such claim of right, if made

in good faith, would negative an intent to deprive the owner of her goods.

As we discover no error, it must be so certified to the circuit court, and that judgment be entered on the verdict.

The other judges concurred.

MOSES C. WRIGHT v. THE PEOPLE.

(61 Ill., 382.)

EMBEZZLEMENT.—The act of March 4, 1869, which provides that any warehouseman, storage, forwarding or commission merchant who, otherwise than as instructed by the consignor of the goods, on demand of the consignor, fails to deliver over the proceeds or profits of such goods, after deducting the usual per cent., on sale as commissions, shall be guilty of a misdemeanor, being a penal statute, must receive a strict construction, and an actual demand is an indispensable pre-requisite to a conviction.

Writ of error to the Criminal Court of Cook County.

This was a prosecution against the defendant, on an indictment found under the Act of March 4, 1869, for the protection of consignors, etc.

The indictment was as follows:

State of Illinois, County of Cook, ss., of the December Term of the Criminal Court of Cook County, in said county and state, in the year of our Lord one thousand eight hundred and seventy.

The grand jurors chosen, selected, and sworn, in and for the county of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their

oaths present that Moses C. Wright, late of said county, on the first day of November, in the year of our Lord one thousand eight hundred and seventy, in the county and state aforesaid, being then and there a commission merchant, did unlawfully convert to his own use the sum of sixty-one dollars, the property of Abijah Birdsey, the same being then and there the proceeds arising from the sale of a certain quantity of peaches before then consigned by said Birdsey to said Wright, otherwise than as instructed by said Birdsey, the consignor thereof, and that he, the said Moses C. Wright, then and there unlawfully failed to deliver over the proceeds aforesaid, after deducting the usual per cent. on the sale of said peaches as commission, on demand then and there made therefor by the said Abijah Birdsey, contrary to the statutes and against the peace and dignity of the same people of the state of Illinois.

At the February Term, 1871, of said court, the defendant was convicted, and adjudged to pay a fine of $100.

Mr. Sidney Thomas for the plaintiff in error.

Mr. Charles H. Reed, (State's Attorney), for the people.

PER CURIAM. The statute of 1869, under which the indictment in this case was found, declares that "If any warehouseman, storage, forwarding or commission merchant, or his or their agents, clerks, or employes, shall convert to their own use the proceeds or profits arising from the sale of any fruits, grain, flour, beef, pork, or any other goods, wares or merchandise, otherwise than as instructed by the consignor of said goods, and shall, on the demand of the consignor, fail to deliver over the proceeds or profits of said goods, after deducting the usual per cent. on sales as commissions, shall be deemed guilty of a misdemeanor," etc.

This statute, being penal in its nature, must receive a strict instruction. An actual demand, to be made by the consignor upon the commission merchant, is an indispensable pre-requisite to a conviction.

The complaining witness testified that, when he went into the place of the accused, in Chicago, the latter said: "I know

what you have come for, but it is impossible for me to pay you anything now." The witness stated that the accused knew well enough what he had come for, and this was all the demand he claimed to have been made.

In a civil cause, where a demand was necessary, such evidence might be sufficient for a jury to find a waiver.

But the statute under consideration requires both a wrongful conversion of the proceeds and a failure to deliver them over after a demand made by the consignor to constitute the offence.

The demand should be made in such a manner as to fairly apprise the merchant that he would be subject to the penalties of the statute if he failed to comply, else he might, by the very course of dealing assented to by the consignor, be entrapped into the consequences of a criminal offence unawares, and without any wrong intention. Such a result would be repugnant to the spirit of our criminal code, and, as we believed, to the intention of the statute in question.

The evidence was not sufficient to sustain the verdict, and the court should have granted a new trial.

The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

KRIBS v. PEOPLE.

(82 Ill., 425.)

EMBEZZLEMENT.—If the defendant is personally liable for the repayment of money, his conversion thereof is not embezzlement.

Evidence of other distinct embezzlements cannot be given.

PER CURIAM: This was an indictment in the circuit court of Kane county, against John C. Kribs, for embezzlement. On a trial of the cause, the defendant was found guilty and sentenced to the penitentiary for one year.

It appears, from the evidence introduced on the trial of the cause, that George U. Shaver, on the 26th day of June, 1874, placed in the hands of the defendant $550, to be loaned at the rate of ten per cent. for one year. A receipt was given for the money, which was as follows:

"ELGIN, Ill., June 26, 1874.

"Received of George U. Shaver, five hundred and fifty dollars, to be loaned at ten per cent. for one year from this date.

JOHN C. KRIBS."

One hundred and fifty dollars was paid back to Shaver on the 9th day of November, 1874, and at the same time interest was paid on the entire amount to the 1st day of December, 1874. The balance of the money the defendant converted to his own use.

If the money was placed in the hands of the defendant to be loaned for one year, upon real estate security, at ten per cent per annum, and he fraudulently converts the same to his own use, the defendant would, no doubt, be guilty of the offence charged. If, on the other hand, Shaver placed the money in the hands of the defendant and looked to him for a repayment, and relied upon the guaranty of the defendant for ten per cent. interest from the time the money was paid over, then no conviction could be had. While we do not propose to express any opinion on the evidence, yet the fact that the defendant guaranteed ten per cent. interest from the date the money was received, and the subsequent payment of interest on the money to December 1, 1874, in connection with the agreement to repay the $400 on thirty days' notice, may properly raise a well founded doubt in regard to the guilt of the defendant.

The proposition is too plain to admit of argument, that if Shaver, when he gave the money to the defendant, relied upon his honesty or responsibility to return it, with ten per cent. interest, he can not resort to the criminal law of the state to assist him to collect the debt.

But, aside from these considerations, the record discloses an error for which the judgment of the circuit court must be reversed.

On the trial, the court allowed the people, over the objection of the defendant, to prove that the defendant had collected or received money belonging to other parties, and on several occasions, which he had fraudulently converted to his own use. This was error. The evidence should have been confined to the charge for which the defendant was indicted. On the trial of this indictment the law did not require him to come prepared to meet other charges, nor does it follow because he may have been guilty of other like offences, that he was guilty of the offence charged in the indictment.

The evidence should have been confined strictly to the offence charged in the indictment. This was not, however, done, but improper testimony was allowed to go to the jury, which could not fail to prejudice the rights of the defendant.

For the error in the admission of improper evidence, the judgment will be reversed and the cause remanded.

Judgment reversed.

STATE v. KENT.

(22 Minn., 41.)

EMBEZZLEMENT.—A joint owner of property is not guilty of embezzlement in fraudulently converting such property to his own use. It is not the property of another within the meaning of the statute against embezzlement.

BERRY, J. Section 23, ch. 95, Gen. Stat., enacts that "if any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servants of any private person, or of any corporation, * * * embezzles or fraudulently converts to his own use, * * * without the consent of his employer or master, any money or property of another, which has come to his possession or is under his care by virtue of such employment, he shall be deemed to have committed larceny." To sustain an indictment under this section of the statute, the money or property charged to have been embezzled, or fraudulently converted, must be the money or property of another than the person indicted.

The defendant was collector of pew rents for a church corporation, and acted as such, under a special and express agreement, by which, as compensation for his services, he was to have "five per cent. of all the pew rents, no matter who collected them." The effect of this agreement was to vest in defendant an undivided one-twentieth interest in the rents

collected, and to that extent to make him an owner of the same, jointly with the corporation. In other words, the rents collected were not the money or property of the corporation, but the joint property of the corporation and the defendant. They were therefore, not the property of *another* than the defendant. It follows that the defendant is not properly indictable, under the section of the statute before cited, for his alleged embezzlement and fraudulent conversion of the same, or any part thereof: *Holmes' Case*, 2 Lewin, 256, cited 2 Archbold Cr. Pr. and Pl., 596, note; *Reg.* v. *Bren*, cited 2 Bish. Cr. Law, § 335, note 3; *Rex* v. *Hoggins*, Russ & Ryan, 145; *Comm. Stearns*, 2 Met., 343, 349; *Com.* v. *Libby*, 11 Met., 64; Com. v. Foster, 107 Mass., 221; 2, Bish. Cr. Law, §§ 355, 356.

This conclusion practically disposes of the case in defendant's favor. Were it necessary for us to pass upon the other points presented in the argument, we should be much inclined to doubt whether, independant of the agreement, the course of dealing between the corporation and the defendant, by which the former acquiesced in his practice of depositing the rents collected on his own general account, and of treating the deposits as his own, was not such as to divest the corporation of its specific property in the deposits, and to establish between it and the defendant the simple relation of creditor and debtor. See Com. v. Libby, 11 Met., 64; Com. v. Stearns, 2 Met., 343. If this doubt be well founded, the result would be the same as that before reached upon the construction of the agreement.

Judgment and order refusing new trial reversed.

NOTE.—Agency cannot be regarded as constituted, under the statute, by the mere relation assumed by one member of a partnership or business society to another. Wharton's Criminal Law, secs. 1910 and 1952 (7 ed), and cases there cited.

THE QUEEN v. NEGUS.

(2 Cr. C. Res., 34.)

EMBEZZLEMENT.—The defendant was indicted for embezzlement under the statute, 24 and 25 Victoria, ch. 96, sec. 68. Held that upon the facts in this case the prisoner was not a "clerk or servant" within the statute.

Case stated by the Assistant Judge of Middlesex session.

The prisoner was indicted for embezzling £17, as clerk and servant to Roper and others.

The prisoner was engaged by the prosecutor to solicit orders for them, and he was to be paid by a commission on the sums received through his means. He had no authority to receive money; but if any was paid to him, he was forthwith to hand it over to his employers. He was at liberty to apply for orders wherever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. Contrary to his duty, he applied for payment of the above sum, and, having received it, he applied it to his own use, and denied, when asked, that it had been paid to him.

The prisoner's counsel contended that the prisoner was not a clerk or servant within the statute, but the learned Judge refused to stop the case, and directed the jury to find him guilty.

The question was whether, upon the facts stated, the prisoner was a clerk or servant, and, as such, rightly convicted of embezzlement.

No counsel appeared for the prisoner.

F. F. Lewis, for the prosecution: *Reg.* v. *Bowers*, 2 Law Rep., 1 C. C., 41, somewhat resembles the present case, and is an authority in favor of the prisoner; but there the commission agent carried on a retail trade for himself at a shop, and so could not be deemed a clerk or servant of the merchant who supplied coal for him to sell.

[BOVILL, C. J. And here the prisoner might apply for orders wherever he thought most convenient.]

So might the traveler in Reg. v. Baily, 12 Cox, Cr. C., 56; he was nevertheless held to be clerk or servant of his employers.

[BLACKBURN, J. For he was under their control, having to devote his whole time to the service.]

The stipulation that the prisoner was not to employ himself for any other persons than the prosecutors shows that they had control over him.

[BOVILL, C. J. Not at all. He might go away to amuse himself wherever he liked.]

Reg. v. Tite, Leigh & Cave, Cr. C.; Reg. v. Turner, 11 Cox, Cr. C., 551, were also cited.

BOVILL, C. J. The only question submitted to us is whether, on the facts stated, the prisoner was a "clerk or servant," and, as such, rightly convicted of embezzlement. The learned assistant judge of the court directed the jury to find the prisoner guilty, subject to this point being raised.

Generally speaking, I should say that the question whether a person is a clerk or servant depends on so many considerations that it is one to be left to the jury, as it is extremely difficult for the court to come to a satisfactory conclusion upon such a matter. Much depends on the nature of the occupation in which the individual is engaged, and the kind of employment. But we have to see if there was enough evidence to show that the prisoner here was a clerk or servant. I think that the fact is not sufficiently made out. What is a test as to the relationship of master and servant? A test used in many cases, is to ascertain whether the prisoner was bound to obey the orders of his employer, so as to be under his

employer's control, and on the case stated, there does not seem sufficient to show that he was subject to his employer's orders, and bound to devote his time as they should direct. Although under the engagement with them, it appears he was still at liberty to take orders, or to abstain from doing so, and the masters had no power to control them in that respect. Where there is a salary, that raises a presumption that the person receiving it is bound to devote his time to the service, but when money is paid by commission, a difficulty arises, although the relationship may still exist where commission is paid, as in ordinary cases of traveler, in Reg. v. Tite, Leigh & Cave, Cr. C., 29; 30 T. J. (M. C.), 142, and the other cases cited. But in either case there may be no such control, and then the relationship does not exist. All the authorities referred to seem to show that it is not necessary that there should be a payment by salary—for commission will do—nor that the whole time should be employed, nor that the employment should be permanent—for it may be only occasional, or in a single instance, if, at the time, the prisoner is engaged as servant. The facts before us do not make out what the prosecution was bound to prove, viz., that the prisoner was clerk or servant.

BRAMWELL, B. This conviction ought to be quashed, unless we can see that the prisoner, on the facts stated, must have been clerk or servant, within the meaning of the act of Parliament. I am of opinion that on the facts we cannot do so. Looking to principle, we find that the statute was intended to apply, not to cases where a man is a mere agent, but where the relationship of master and servant, in the popular sense of the term, may be said to exist. ERLE, C. J., in Reg. v. Bowers, Law Rep., 1 C. C. R., 41, at p. 45, says the cases decide "that a person who is employed to get orders and receive money, but who is at liberty to get those orders and receive that money when and where he thinks proper, is not a clerk or servant within the meaning of the statute." I think that is perfectly good law, consistent with all the authorities, and applied here, it shows that the prisoner was not a clerk or servant within the definition there given.

BLACKBURN, J. I am of the same opinion. The test is very much this, viz., whether the person charged is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to this service; but, if bound to devote his whole time to it, that would be very strong evidence of his being under control. This case differs in nothing from the ordinary one of a commission agency, except in the sole statement that the prisoner was not to work for others. But I do not think that circumstance, by itself alone, enables us to say that he was a servant of the prosecutors.

ARCHIBALD, J., concurred.

HONYMAN, J. I agree. The question was not left to the jury to decide, and I cannot satisfy myself that the relationship of master and servant existed between the prosecutors and the prisoners. It does not appear that the prisoner was bound to obey every single lawful order. Possibly the master might tell him to go somewhere, and he might justly refuse.

Conviction quashed.

For the statute, 24 and 25 Vict., ch. 96, sec. 68, see ante page 10.

THE PEOPLE v. ALLEN.

(5 Denio., 77.)

EMBEZZLEMENT.—An indictment upon a statute, must state all the facts and circumstances which constitute the statute offence, so as to bring the accused precisely within the provisions of the statute. The indictment must allege in direct terms, that the person indicted was a *clerk* or *ser-*

vant, officer or *agent, etc.* A constable who is employed to collect debts, by suit or otherwise, is not a "servant" or "clerk" within the meaning of the statute.

The defendant was indicted and convicted, for embezzling certain money of one Wm. H. Snyder, his master, without the assent of said Snyder.

It appeared on the trial that the defendant was a constable, and had entered into an agreement with Snyder to collect accounts. One of the accounts was against Daniel Darrow, defendant procured in favor of Snyder and against Darrow; who paid the claim without any service of the process. Defendant returned the summons, and upon his evidence judgment was rendered against Durrow and in favor of Snyder.

For the defendant it was argued that an *agent* is not within the provisions of the statute, that the relation existing between the defendant and Snyder was not sufficient to make the act of appropriating the money of the latter to his own use an act of embezzlement.

For the people it was argued, that the defendant was a servant of Snyder, and the money embezzled was that of the employer.

By the court, BEARDSLEY, Ch. J. As the defendant was found guilty on the first count of the indictment only, the others having been abandoned by the public prosecutor, that count alone is now in question. It is not pretended on behalf of the people that the first count charges any offence at common law, but it is said to be sustained on the statute as to embezzlement. (2 R. S., 678, § 59.) The first clause of this section of the statute, and which alone can be supposed to have any bearing on the case in hand, is, in terms, limited to *clerks* and *servants*, and has no application to any other class or description of persons. But the first count of the indictment charges that the defendant as the *agent* of Snyder, collected and received the money alleged to have been embezzled, and not that it was collected and received as his *clerk* or *servant*. Nor is the averment that the money was received as agent, at all changed or qualified by the subsequent allegation that it came to the possession of the defendant "by

virtue of his said employment *as such servant* of the said—Snyder, and while he was such servant *as aforesaid.*" This only amounts to an allegation that the money was received by the defendant as *such servant*, as an agent is or may be, and not that he in fact received it as the servant of Snyder.

The term agent is *nomen generalissimu*, and although it includes clerks and servants, who are properly agents of their employers and masters, it is by no means restricted to such persons. (Paley on Agency, by Dunlap, p. 1 and note.)

An indictment upon a statute must state all such facts and circumstances as constitute the statute offence, so as to bring the party indicted precisely within the provisions of the statute. (1 Chit. Cr. L, 281, 282, 283, ed. of 1841; Archb. Cr. Pl., 50, ed. of 1846.) If the statute is confined to certain classes of persons, or to acts done at some particular time or place, the indictment must show that the party indicted, and the time and place when the criminal acts were perpetrated, were such as to bring the supposed offence directly within the statute. In conformity with these principles it will be seen that the precedents of indictments on the English statutes as to embezzlements and which like the clause of the revised statutes referred to, apply in terms to clerks and servants only, uniformly allege in direct terms, that the person indicted was such clerk or servant. (3 Chit. Cr. L., 962; 3 Maule & Sel., 539; Archb. Cr. Pl., 275.) These precedents for indictment on 39 Geo. 3, ch. 85, and 7 and 8 Geo. 4, ch. 29. But indictments on 52 Geo. 3, ch. 63, which makes certain acts of brokers, agents and others, criminal offences, also allege that the party indicted was a broker, agent or other particular person, as the case might be. (3 Chit. Cr. L., 967.) These precedents are in conformity with the settled rule of law on this subject; the court below therefore erred in holding that the first count charged an offence within the section of the revised statutes to which reference has been made. On this ground alone a new trial would be proper, although I entertain no doubt that the defendant, upon the evidence in the case, was neither a servant nor clerk of Snyder, within the true meaning of this section of the statute; and therefore had the indictment been such as the law requires, the defendant could not have been

convicted of embezzlement. Whether either of the other counts in this indictment can be sustained, I shall not undertake to determine. The conduct of the defendant, if the witnesses are to be credited, and nothing appears in the case as presented to render their statements at all questionable, was grossly fraudulent, and in some respects of the most aggravated criminality. But whether this indictment is adapted to any offence which can be proved, may be determined on another trial.

New trial ordered.

NOTE—In Zschocke v. People, 67 Ill., 127, the prisoner was a constable, and one Eck, having an execution in his favor, issued upon a Justice's judgment, against one Jacob Forsythe, delivered the writ to the prisoner, to be executed; under the execution, the prisoner levied upon certain goods of the judgment debtor, and took them to Eck's house and put them in his possession; afterwards the prisoner came and took the goods away, with Eck's consent, and sold them at private sale, receiving therefor $55 which the prisoner converted to his own use.

The prisoner being convicted upon an indictment charging him with having stolen divers United States notes and current bank bills, for the payment of $55 etc., the personal goods and property of Mathias Eck, he removed the case to the supreme court where it was *held*, 1. That the levy and seizure under the execution vested in the constable a special property only; the general property remaining in the judgment debtor until a sale according to law, that the plaintiff in the execution, acquires no property in the goods by the seizure, that he could not maintain an action of trespass or trover against a wrong-doer. Such action could be brought only by the officer. 2. When a sale is made under the writ, pursuant to law, then the general property of the judgment debtor becomes divested, and the proceeds of the sale remains in the custody of the law until actually paid over to the plaintiff; and that in no view of the case would the evidence support the position that the prisoner was the bailee of Eck, as to the money received upon the private sale of the goods. And the judgment was reversed.

QUEEN v. FOULKES.

(2 Cr. Cas., Res. 150.)

EMBEZZLEMENT.—The prisoner lived with his father, who was clerk to the local board of Whitechurch and Dodington, at a salary £40 a year. The prisoner lived with his father, and assisted him in his office. He was not appointed or paid by the local board, and there was no evidence that he was paid any salary by his father. In the course of business the prisoner received and appropriated to his own use a sum of money belonging to the local board. Held, that the prisoner was a clerk or servant to his father, and guilty of embezzlement.

Case stated by QUAIN, J.

The prisoner was tried, at the last assizes for Shropshire, for embezzlement. The indictment upon which the prisoner was tried contained four counts. On the first count he was charged that on the 22d day of September, 1871, he was employed as a clerk to the local board of Whitechurch and Dodington, and received £600 on account of said local board, and did steal £100, parcel of the said £600, the moneys of the said local board, his employers. On the second count, that on the 14th of February, 1872, he embezzled the sum of £100, the money of the said local board, his employers. On the third count, that on the 22d day of September, 1871, he embezzled the sum of £100, parcel of a sum of £600, the money of Charles Foulkes, his master. On the fourth count, that on

the 14th day of February, 1872, he embezzled the sum of £100, the money of Charles Foulkes, his master. Charles Foulkes, the father of the prisoner, was appointed clerk to the local board of Whitechurch and Dodington, at a salary of £40 a year, and continued to hold such appointment till his death. Charles Foulkes held various other appointments. The business of the board was transacted at his office, the board paying him a rent for the use of it. The prisoner lived with his father, and assisted him in his office, and in conducting the business of the local board. In the absence of his father, prisoner acted for him at the meetings of the local board, and assisted his father when present. Prisoner was not appointed or paid by the local board. There was no evidence that the prisoner was paid any salary by his father. The only evidence was that he in fact assisted his father as clerk, or servant, or assistant in his office as above described. In the year 1871, and while Charles Foulkes was clerk to the local board as above mentioned, the board had occasion to raise a loan for the purpose of building a market. The money was raised on mortgages of the local rates. The prisoner managed the business of the local board for his father. He filled in the usual form of mortgage, and either he or his father obtained the proper signatures of the members of the local board. The course of business was, that prisoner received, at his father's office, the money from the mortgages, in exchange for the mortgages, and paid it into the Whitechurch and Ellesmere Bank (who were the treasurers of the board), to an account called the "market account." In the course of his employment, he embezzled and appropriated to his own use the sum of money mentioned in the indictment. It was objected by the counsel for the prisoner, that he could not be convicted of the first two counts of the indictment, as he was not a clerk or servant of the board, nor employed by the board in that or any other capacity; and that he could not be convicted on the third or fourth count, as there was no evidence that he was the clerk or servant of his father, or was employed by him in that capacity, beyond the fact that he assisted his father, and that the moneys embezzled were not the moneys of Charles Foulkes, but of the local board. The prisoner was convicted and sentenced, but the learned

judge respited the execution of the sentence till after the decision of the court in the case. The question for the court was, whether, upon the above facts, the prisoner could be properly convicted on any of the counts of the indictment. The following cases were cited before the learned Judge: Reg. v. Negus, Law Rep. 2 C. C., 34; Reg. v. Beaumont, Dears. Cr. C., 270; 23 L. J. (M. C.), 54; Reg. v. Tyrn, Law Rep. 1 C. C., 177, and the 11 and 12 Vict., ch. 63, sec. 138, was referred to as authorizing the board (the district being a non-corporation district) to allege that the property was the property of their clerk.

Rose, for the prisoner.

The prisoner could not properly be convicted of embezzlement. To constitute embezzlement by a person "being a clerk, or servant, or being employed for the purpose or in the capacity of a clerk or servant," 1, there must be a contract of service of some kind, either expressed or implied. In the present case there was none, for the prisoner was in no sense in the employment of the local board, and the services he rendered to his father were mere voluntary services, not rendered in pursuance of any contract. He cited Rex v. Burton, 1 Moo. Cr. C., 237; Rex v. Hettleton, 1 Moo. Cr. C., 259; Reg. v. Bowers, Law Rep., 1 C. C., 41; Reg. v. Tyrn, Law Rep. 1 C. C., 177; Reg. v. Turner, 11 Cox Cr. C., 551; Reg. v. Cullum, Law Rep., 2 C. C., 28; Reg. v. Negus, Law Rep., 2 C. C., 34.

No counsel appeared for the prosecution.

COCKBURN, C. J. I think there was evidence on which the jury might well find that the prisoner either was a clerk or servant. The father held various offices, and the prisoner, his son, in consequence of his father's illness, or for other reasons, did the duties which the father would otherwise have had to do himself, or to employ a clerk to do. It is true there was no contract binding him to go on doing those duties. But the relation of master and servant may well be terminable at will, and while the prisoner did act, he was a clerk or servant.

The second question is, whether there was an embezzlement. I think there was. The money was to be received by the father, though received for the local board. He was the proper custodian of the money, and the son received it for him. There was, therefore, evidence upon both points.

BRAMWELL, B. I am of the same opinion. If the prisoner had not been the son of the man for whom he acted, and had not lived with him, it is abundantly evident that he would have been a clerk or servant, and would have been entitled to payment upon a *quantum meruit*. Then what difference can his being a son make? It may affect the nature of his remuneration, but nothing else.

With regard to the money, the father might have had to account for it, but he was entitled to receive it from the son, therefore there was an embezzlement.

MELLAR. J. The only difficulty which I can collect that the learned judge felt was, that there was no evidence of an actual contract of employment. But there is clear evidence that in what the prisoner did, he was a clerk or servant.

BRETT, J. The prisoner undertook to do things for his father which a clerk does for his master, and to do them in the way a clerk does them. Now, assuming that there was no contract to go on doing those things, still as long as he did them with his father's agreement, he was bound to do them with the same honesty as a clerk, because he was employed as a clerk.

POLLOCK, B. If it had been necessary to say absolutely that the prisoner was a clerk or servant, I should have hesitated. But I think the words "employed as clerk or servant" are wider, and that there is evidence to bring the case within them.

Conviction affirmed.

For the 24 and 25 Vict., ch. 96, sec. 68, see ante, p. 10.

The People v. Sherman.

(10 Wend., 299.)

Embezzlement.—A stage-driver who is entrusted with money by virtue of his employment, is a "servant" within the meaning of the statute.

The defendant was employed by Sprague & Demmon as a stage-driver, and, as such, received a package of bank bills, to be deposited by him in a certain bank. Instead of depositing the bills in the bank, as directed, he absconded with them.

For the defendant, it was insisted that he could not be considered the *clerk* or *servant* of his employer, within the meaning of the statute.

For the people, it was argued that any one who is entrusted with money, in consequence of his employment, is a servant within the statute.

Southerland, J. The defendant was properly convicted under the count for embezzlement. The provisions of the revised statutes, under which the counts were framed, is sufficiently comprehensive to embrace these cases: 2 R. S., 678, § 59. The defendant was the servant of Sprague & Demmon, and the money which he embezzled came into his possession, or under his care, *by virtue of his employment as such servant*, within the meaning of the act. He drove the stage of Sprague & Demmon from Lyons to Geneva, and Sprague & Demmon contracted with the collector of canal tolls at Lyons to send

the tolls collected by him weekly to Geneva, and deposit them in the bank at that place, to the credit of the treasurer, for which they were to be paid fifty cents per package. A package had once before this been sent by the defendant, and it is to be inferred, though the fact is not expressly stated, that other drivers of Sprague & Demmon had been in the habit of taking them.

The care and custody of packages of every description are a part of the ordinary duty of servants of this description, although it is not their principal business; and it appears to me, that it would defeat one very important object of the act, to restrict its application to clerks or servants, whose principal or ordinary employment was the receiving and taking care of the money, goods, etc., of their employers. Neither the language nor spirit of the act require this restricted construction.

Motion for a new trial denied.

NOTE.—The defendant, Sherman, was guilty of larceny at common law, he had not the *possession*, but only the *custody* of the money.

See R. v. Lavander, *ante;* R. v. Paradice, ante; Como v. Berry, post; People v. Dalton, *ante*, and Com. v. Warmouth, post.

THE UNITED STATES v. HARTWELL.

(6 Wallace, 385.)

EMBEZZLEMENT.—A clerk in the office of the Assistant Treasurer of the United States is an officer, or other person, under the 16th section of the Act of Aug. 6, 1846.

The 3d section of the Act of April 14, 1866, does not affect clerks. It is confined to officers of banks and of banking associations. Where the defendant is described in the indictment under the last named Act as clerk in the office of the Assistant Treasurer at Boston, the court has no jurisdiction of the offence charged.

Certificate of division in opinion between the judges of the Circuit Court of the United States, for the District of Massachusetts.

The case is stated by the court.

Messrs. Henry Stamberry, Atty. General and J. H. Ashton, for the plaintiff.

Messrs. H. W. Paine and R. M. Morse, Jr., for the defendant.

Mr. Justice Swayne delivering the opinion of the court.

This case comes before us upon certificate of division in opinion of the Judges of the Circuit Court of the United States for the District of Massachusetts.

As disclosed in the record, the case is as follows:

The defendant was indicted for embezzlement. The indictment contains ten counts. The first three are founded upon the 16th section of the act of August 6, 1846 (9 Stat. at Law, 59), the remaining seven upon the 3d section of the act of June 14, 1866 (14 Stat. at L., 65).

The counts upon the act of 1846, allege that the defendant, being an officer of the United States, to wit: a clerk in the office of the Assistant Treasurer of the United States at Boston, appointed by the Assistant Treasurer, with the approbation of the Secretary of the Treasury, and as such charged with the safekeeping of the public money of the United States, did loan a large amount of said money with the safe keeping whereof he was intrusted in his capacity aforesaid. The names of the borrowers, and the amounts and description of the money loaned are set forth.

The succeeding counts allege that the defendant, being a person, not an authorized depositary of the public moneys of the United States, to wit: a clerk of the office of the Assistant Treasurer of the United States at Boston, appointed by him, with the approbation of the Secretary of the Treasury, having the care and subject to the duty, to keep safely the public moneys of the United States, did knowingly and unlawfully appropriate and apply another portion of said public money, of which he

had the care, and was subject to the duty, safely to keep as aforesaid, for a purpose not prescribed by law, to wit: did loan the same. The particulars with reference to the loans are given as in the preceding counts.

The testimony being closed, the opinion of the judges were opposed upon the points:

(1) Whether the defendant was liable to indictment under the 16th section of the act of August 6, 1846; and,

(2) Whether there is any offence, charged in the last seven counts under the 3d section of the act of June 14, 1866, of which the court had jurisdiction.

The section referred to in the act of 1846, describes in three places the persons intended to be brought within its scope. The language used in that connection, is:

"All officers and other persons charged by this act, or any other act, with the safe keeping, transfer and disbursement of the public money, and hereby required," etc.

"If any officer charged with the disbursement of the public money, shall accept or receive," etc.

"The provisions of this act shall be so construed as to apply to all persons charged with the safe keeping, transfer or disbursement of the public money, whether such persons be indicted as receivers or depositories of the same."

Was the defendant an officer or person "charged with the safe keeping of the public money," within the meaning of the act? We think he was both.

He was a public officer. The General Approbation Act of July 23, 1866 (14 Stat. at L., 200), authorized the Assistant Treasurer, at Boston, with the approbation of the Secretary of the Treasury, to appoint a specified number of clerks, who were to receive, respectively, the salaries thereby prescribed. The indictment avers the appointment of the defendant in the manner provided in the act.

An office is a public station, or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, employment and duties.

The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his

superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other. U. S. v. Maurice, 2 Brock., 103; Jackson v. Healy, 20 Johns., 495; Vaughn v. English, 8 Cal., 39; Sanford v. Boyd, 2 Cranch, C. C., 79; ex parte Smith, 2 Cranch, C. C., 693.

The defendant was appointed by the head of a department, within the meaning of the constitutional provision upon the subject of the appointing power. Const., Art. II., Sec. 2.

The sixth section of the act of 1846, after naming certain public officers specifically, proceeds:

"And all public officers, of whatever grade, be, and they are, hereby required to keep safely, without loaning, using, or depositing in banks, or exchanging for other funds than as allowed by this act, all public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper department or officer of the government, to be transferred, or paid out."

This clearly embraces the class of subordinate officers to which the defendant belonged.

We are of the opinion that the act prescribes punishment for the offence with which the defendant is charged.

The first part of the sixteenth section declares, that if any officer to whom it applies shall convert to his own use, loan, deposit in bank, or exchange for other funds, except as permitted by the act, any of the public money intrusted to him, every such act shall be deemed and adjudged to be an embezzlement, and is made a felony.

It next enacts that if any officer, charged with the disbursement of public money shall take a false voucher, "every such act shall be a conversion to his own use of the amount specified" in such voucher.

This clause then follows: "And any officer or agent of the

United States, and all persons participating in such act, being convicted thereof before any court of the United States of competent jurisdiction, shall be sentenced to imprisonment, for a term of not less than six months nor more than ten years, and to a fine equal to the amount of the money embezzled."

This clause is to be taken distributively. It applies, and was clearly intended to apply, to all the acts of embezzlement specified in the section—to those relating to moneys in the first category, as well as those relating to vouchers in the second. The context of the section and the language of the clause both sustain this view of the subject. If this be not the proper construction, then the consequences would follow that in this elaborate section, obviously intended to cover the whole ground of fraud by receivers, custodians and disbursers of the public money, of every grade of office, punishment is provided for only one of the offences which the act designates. There is no principle, which, properly applied, requires or would warrant such a construction.

It is urged that the terms used in the sixteenth section to designate the persons made liable under it, are restrained and limited to principal officers, by requirements and provisions which are applicable to them, and are inapplicable to all those holding subordinate places under them. To this there are several answers. We think the only effect of these provisions is to operate, according to their terms, where such higher officers are concerned. They are without effect as to the subordinates, to whom they are inapplicable. They do not take offenders of that class out of the penal, and other provisions of the statute, which must be conceded otherwise to embrace them. The broad language of the provision in the preceding sixth section, which has been referred to, is coupled with no qualification whatever, expressed or implied.

If the subordinates are not within the act, there is no provision in the laws of the United States for their punishment in such cases. So far as those laws are concerned, they may commit any of the crimes specified with impunity. We think it clear that it was not the intention of Congress to leave an omission so wide and important in the act, and our minds have

been brought satisfactorily to the conclusion that they have not done so.

We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But, whenever invoked, it comes attended with qualifications and other rules no less important. It is by the light which each contributes, that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear, it is conclusive. There can be no construction, where there is nothing to construe. The words must not be narrowed, to the exclusion of what the Legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over strict construction. The rule does not exclude the application of common sense to the terms made use of in the act, in order to avoid any absurdity which the Legislature ought not to be presumed to have intended. When the words are general, and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes, in the fullest manner, the policy and objects of the Legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent. U. S. v. Wiltberger, 5 Wheat., 96; U. S. v. Morris, 14 Pet., 475; U. S. v. Winn., 3 Sumn., 211; 1 Bish. Cr. Law, sec. 123; Bac. Abr., tit. Statute, 1.

We think we have not transcended these principles, in coming to the conclusions we have announced.

The determination of the second question certified depends upon the construction of the third section of the act, to which it refers.

That section provides, "that if any banker, broker or other person, not an authorized depository of public money," shall do either of the acts therein specified, every such act shall be held to be embezzlement. The penal sanction with which the section concludes is as follows: "And any president, cashier, teller, director or other officer of any bank or banking association, who shall violate any of the provisions of this act, shall be deemed and adjudged guilty of an embezzlement of public money, and punished as provided in section two of this act."

This clause is limited in its terms to the officers named in it. There is nothing which extends it beyond them. It cannot, by construction, be made to include any others. It is confined to officers of banks and banking associations. The defendant is not brought within the act by the averments contained in the counts of the indictment, which are founded upon it. They describe him only as a clerk in the office of the Assistant Treasurer, at Boston. As such, the act does not affect him, and the court has no jurisdiction of the offences charged. These counts are, therefore, fatally defective.

The first point certified up will be answered in the affirmative, and the second in the negative.

Mr. Justice Miller, Mr. Justice Grier and Mr. Justice Field dissented to the answer given to the first question, holding that the statute applied exclusively to the *legal custodians of the public money*, and not to their *clerks*.

A dissenting opinion was filed by Mr. Justice Miller, which is omitted here.

The People v. Hennessey.

(15 Wend., 148.)

Embezzlement.—The words *any other person*, in the statute, *means persons other than he who is* guilty of the embezzlement.

Evidence. The unsupported confession of a defendant will not sustain a conviction for embezzlement.

Defendant was indicted for embezzling money, received by him as the servant of one Joseph Fisk, his master.

It appeared upon the trial that Fisk was the Marshal of the city of Albany, a corporation, and, as such, employed the prisoner to collect assessments upon property in that city.

Defendant asked for his discharge, 1, on the grounds; that the embezzlement statutes did not apply to the *property of the master*, but to the property of *any other person*; 2, That the defendant was the servant of Fisk, in his official capacity as marshal, and not of *a private person*, within the statute; 3, That the proof of the receipt of the money was not sufficient; 4, That the *corpus delicti* had not been proved.

By the court, Savage, C. J. In this case two questions arise; 1, Whether the indictment charges an offence under the statute; 2, Whether the conviction was proper. The statute is in substance as follows:

If any clerk or servant of any private person or corporation shall embezzle or convert to his own use, without the assent

of his master or employer, any money, goods, rights in action, or other valuable security, or effects whatever, *belonging to any other person*, which shall come into his possession, by virtue of such employment, he shall, upon conviction, be punished, etc. The defendant's counsel insists, that to bring the offence within the statute, the property embezzled should belong to some person other than the master; and he contends that such is the true construction of the statute; that the words "belonging to any other person," means belonging to any person other than the master, or employer. To my mind it is very clear that they mean, belonging to any person other than the servant who is guilty of the embezzlement. The idea is, that he shall be punished for unlawfully converting or appropriating to his own use any money, goods, etc., of any person other than his own, which shall come to his hands, by reason of his relation in which he stands as clerk or servant to his employer. Any other construction would impute to the legislature an absurdity. The very term "embezzlement" is peculiarly applicable to a fraudulent appropriation, made by a servant, of goods entrusted to him by his master. By the common law, it was not larceny in a servant fraudulently to dispose of his master's goods committed to him to keep, but only a breach of trust. The statute 21 H. 8, ch. 7, recites that it was doubtful whether such an offence was felony, and it enacts that servants being over eighteen years of age, and not apprentices, to whom caskets, jewels, money, goods or chattels of their masters shall be delivered to keep, and who shall embezzle the same, or convert the same to their own use, with intent to steal, shall be adjudged guilty of felony, and punished accordingly. This statute, in terms, made the offence of embezzling property delivered by the *master*, felony; the property of *others* was not expressly embraced, and it was held, in *Bazely's* case, 2 East's P. C., 571, that where a banker's clerk received money and notes paid in by a customer, and embezzled the notes, that the offence was not larceny, but only a breach of trust. This decision produced the statute 39 Geo. 3, ch. 85, which is entitled "an act to protect masters against embezzlement by their clerks or servants." It recites, that whereas bankers, merchants and others are obliged to entrust their clerks and servants with re-

ceiving, paying, negotiating, exchanging or transferring money, goods, bonds, bills, notes, bankers' drafts, and other valuable effects and securities; and whereas doubts have been entertained whether the embezzling of the same amounts to felony, it enacts that the person, so embezzling the same, shall be deemed to have feloniously stolen the same from his master or employer, for whose use, or on whose account the same was delivered to him, or possession taken by him. The statute 21 Henry 8, ch. 7, was substantially enacted in this state, in 1788, 1 R. L., 112, which was confined to the embezzlement of money, goods or chattels delivered to be safely kept. The act of February 25, 1813, extends the offence to the embezzling of not only money, goods and chattels, but also bills of exchange, bonds, orders, warrants, bills or promissory notes, for payment of money or any public security. The act of April 13, 1819, declares that officers, agents, clerks or servants of banks, or any person employed in such capacity, who shall embezzle any money, goods, bonds, bills, checks, notes, bankers' drafts, or other valuable security or effects whatsoever, belonging to such bank, or to any person having lodged the same with such bank, or such officer or servant, shall be guilty of felony, etc. The revised statutes, 2 R. S., 678, § 59, were no doubt intended to embrace, and do embrace, the pith and substance of both our previous statutes, and also of the 39th Geo. 3, ch. 85. Can it be believed, that when the whole course of legislation on this subject, has been aimed at the protection of the master or employer, against the frauds of those necessarily entrusted with their property, the legislature, when revising and embodying previous statutes into a more simple form of enactment, should lose sight of the great object in view, and protect every person except the one most liable to be defrauded? The 60th section shows that it was the intention of the legislature to go further in favor of the master or employer than of other persons, by making it an offence to embezzle any instrument executed by such master, but not yet issued; a note, for instance, drawn and signed for the purpose of being discounted, or delivered in the course of business, but not actually put in circulation. It is very clear, therefore, that the offence consists in embezzling the money, goods, rights in action, or other valuable security or

effects whatever, belonging *to any person other than the person guilty of the embezzlement*, which shall have come to his possession, or under his care, by virtue of his employment as clerk or servant of a private person; or as officer, agent, clerk or servant of any incorporated company.

The next point arising upon this bill of exceptions is, whether the defendant was properly convicted upon his own confession made to his master, uncorroborated by any other fact or circumstance. Generally speaking, the admission of a fact renders it unnecessary to prove it. Of admissions, or confessions, there are several kinds: 1. A confession in open court of the prisoner's guilt, which is conclusive, and renders any proof unnecessary; 2. The next highest kind of confession is that which is made before a magistrate; 3. The lowest is that which is made to any other person. All these confessions, if voluntary, are competent evidence, and it is said, by most writers on the law of evidence to warrant a conviction, although there is no positive proof *aliunde* that the offence was committed. 1 *Macnally*, 51; 1 Phil. Ev., 86; Archb. Cr. Pl., 55.

It is stated by Mr. East, in his Crown Law, 1 East's P. C. 133, that in the case of Francis Francia, in 1716, it was agreed, at a conference of the judges, preparatory to his trial, among other things, that in all cases the confession of a criminal may be given in evidence against him; and that in case of treason, if such confession be proved by two witnesses, it is proper evidence to be left to the jury. Mr. Justice Foster thought this decision wrong, though he admitted it might be too late to controvert the authority of it. He insists that the rule should never be carried further than to a confession made during the solemnity of an examination before a magistrate. For, he observes, hasty confessions, made to persons having no authority to examine, are the weakest and most suspicious of all evidence; words are often misreported, and extremely liable to misconstruction, and while, he says, this evidence is not, in the ordinary course of things, to be disproved by negative evidence, as proof of plain facts may be, and often is confronted. It will be found, I think, that however broadly judges and elementary writers have laid down the rules, yet most, if not all the reported cases, show that very few convic-

tions have taken place without some evidence that a crime has been committed, independent of the confession of the accused. The case of John Bemish, Foster's Cr. L. 10, is an instance of a conviction on the confession of the prisoner. There was, however, one witness who proved him to have been in arms with the rebels; and the two witnesses who swore to his confession, who also saw him among the officers of the rebels, who were confined apart from the common men, and he there gave in his name as a lieutenant. See Lamb's case, 2 Leach, 625; Thomas' case, in 728; Wheeling's case, 1 Leach, 349. In the case of Rex v. White, Russell & Ryan, 508, the defendants were indicted and tried for stealing four bushels of oats, the goods of William Pearce. On the trial, Pearce could not swear that he had lost any oats. There was other evidence. Pearce found that the door of his granary had been forced. Another witness saw two men coming from Pearce's yard about two in the morning, each with a sack on his shoulders. Another swore that the prisoner, White, asked him to carry oats to a Mr. Johns, who swore that he bought oats at the time mentioned of White; and it was also proved that those oats were of the same kind with Pearce's. The confessions of the prisoner before a magistrate were then produced and given in evidence, although Mr. Justice Burrough doubted the propriety of it, as Pearce was unable to prove that a felony had been committed. The point was reserved for the judges, who afterwards held the conviction right. Another prisoner was tried at the same time (John Tippet), for a similar offence, and upon similar testimony, together with his confession. The judges were of opinion that the conviction was right, as there was not only the confession, but the evidence of Pearce, which made it probable that oats had been stolen, and also evidence that the door of the granary had been broken. Most of the judges thought the confession alone sufficient, but they laid stress upon the fact that there was other evidence, though not sufficient, perhaps, to prove that a felony had been committed. So, too, in Rex v. Eldridge, Russell & Ryan, 440, the prisoner was convicted upon his confession for stealing a mare; but it was proved that he had the mare in his possession, under very suspicious circumstances, and sold her for £12, she being worth £35.

The judge who presided, thought there was not evidence of a felony having been committed, independent of the confession, which had been taken before a magistrate. The case was referred to the judges, who were of opinion that there was sufficient evidence to confirm the confession, and that the conviction was right. Rex v. Falkner & Bond, Russell & Ryan, 481. The defendants were convicted upon their confession of the robbery of one Halliday. Halliday did not appear upon his recognizance; and there was evidence that Falkner had been desirous of preventing Halliday's appearing. The conviction was held right. These convictions were in 1812 and 1823; and if the rule had been settled by previous cases, where was the necessity for producing any evidence beside the confessions? The truth is, no court will ever rely upon the confession alone, when it is apparent that there is evidence *aliunde* to prove that an offence has been committed. In the case now before us, it was manifest that there were witnesses, not before the court, who could have given material testimony to prove facts, essential to the body, of the offence. In all the cases in Russell & Ryan, an attempt was made to prove the felony by testimony other than the confession of the prisoner; and in most of them the court were of opinion that the confession was sufficiently corroborated. In this case there was no corroboration; no confession before a magistrate, nor to any person but the prosecutor, and then not under circumstances to show that he was charged with being guilty of a felony. In our opinion such a conviction ought not to be sustained.

New trial granted.

CORY v. STATE.

(55 Georgia, 236.)

EMBEZZLEMENT.—Officers, clerks and agents of unauthorized corporations are not liable to prosecution for embezzling the funds of such corporations.

JACKSON J. The defendant was indicted as cashier of the branch office of the Freedman's Saving and Trust Company, in Atlanta, Georgia, for the offence of embezzlement, in secreting and stealing over $8,000 of money deposited in said branch office, and the indictment was framed on section 4421 of the Code. The question for our review is whether the cashier of the branch office of said company, in Atlanta, is subject to the penalties and punishment prescribed in that section of the Code, and the answer to the question depends upon the answer to this: Was that branch bank, or branch office, a corporate body in this State in the sense of the statute?

1, 2. The Freedman's Saving and Trust Company is a corporation chartered by Congress, and located in the city of Washington. The charter gives it no power to establish a branch anywhere. No act of Congress, outside of its charter, gives it such power, nor has the Legislature of Georgia granted it the franchise to locate a branch for the transaction of its business within the limits of this State. Its existence as a corporation, created by Congress, and located in the city of Washington, will be recognized by our courts; but its exist-

ence as a corporate body, located anywhere in Georgia, must depend upon the power granted in its charter by Congress, or some other constitutional act of Congress, or some statute of Georgia. We have been cited to no such law, and we know of none. It is not the policy of the State to encourage the location in our midst of the branch office of foreign corporations, and the criminal statute should not be so enlarged, by construction, to embrace such branches located here without authority of law. Section 421 of the Code was designed to protect our own corporate bodies, chartered by our own State, and doing business here under the authority of this State, in the exercise of franchise granted by it, and to punish the officers of such corporations for embezzling the funds thereof. The section actually puts such corporations upon an equality with the public departments of the State government, and of the counties, towns and cities of the State, and imposes upon the officers of all alike the same punishment, thus throwing the ægis of its protection around all its corporations as around its counties, towns, cities and the various departments of its own government. It reads thus: "Any officer, servant, or other person employed in any public de-department, station or office of government of this State, or in any county, town or city of this State, or in any bank or other corporate body in this State, or any president, director or stockholder of any bank, or other corporate body in this State, who shall embezzle," etc. Now can it be seriously contended that the legislature meant to include in this section a corporate body in this State exercising franchises here without her authority, and without the sanction of any law, State or federal? Did she mean to protect the exercise of franchises within her limits, which no law-making power recognized by her ever granted, and to place such franchises thus illegally exercised upon an equality with those granted by herself, and upon an equality, too, with her own departments of the State government? We cannot think so; and if she did not so mean in the section of the code quoted, and on which the indictment is framed, the defendant was certainly convicted on this count without authority of law. It is vain to argue that the change of the words "of this State," when applied to

the departments of government, and to the counties, towns and cities in the section to the words "in this State," when applied to the corporate bodies, has any significance. Whenever the banks are elsewhere referred to in this division of the code, they are described as banks in this State, and in such connection as to make it unmistakable that the Legislature means banks chartered by this State. See Code, Sec. 4426, 4427. It is a fundamental principle of the common law that penal statutes should be construed strictly. It is scarcely necessary to invoke the rule of construction here. It would require an extremely liberal construction to bring the officer of a corporate body, illegally located in the State, within the purview of this statute.

3, 4. But there is a second count in the indictment, and the punishment under the section is the same as under the first count; it is, therefore, said that the verdict of guilty, being general, may be predicated upon either count. That may be so; and as we recognize the Freedman's Saving and Trust Company as an artificial person living in the city of Washington, and some of whose property may have got into Georgia, and somebody intrusted with it here may have stolen it, and as this second count is framed upon section 4422 of the Code, which punishes any bailee who thus steals after a trust, we do not see why this defendant could not be punished under the facts proven in this case under the section. We regret, therefore, that on examining the transcript of the record, we find that this count, as it appears there, is bad, it being alleged that the fraudulent conversion of the money was made *with* the consent of the owner. Of course no crime is charged in such a count, and there can be no legal conviction upon it. It is said that the clerk, in copying the bill of indictment, made a mistake and wrote "with" when he should have written "without the consent of the owner." This may or may not be true. It has not been verified to us in the only way it can legally be done, by a suggestion of a diminution of the record on or before the calling of the case. Code, section 4282, rule 9. Our only course is to adhere to the law, and to rule on principle. It may sometime work seeming injustice; a departure from it would open the flood-gates of speculation,

and unsettle the entire practice of the court. In this case any wrong done can be but temporary; the party can be tried again, and if found guilty on the second count properly framed, he can be punished according to law.

Let the judgment be reversed, and a new trial granted.

NOTE.—In People v. Barrie, 49 Cal., 342, the defendant was charged in the indictment with having, on the 3d day of February, 1874, stolen ten flasks and three soda bottles containing quicksilver, the property of the "Quicksilver Mining Company, of New York."

The prosecution, on the trial, proved by one Rondel, that the company known by the name of the "Quicksilver Mining Company of New York," was doing business as a corporation *de facto* in California. The defendant argued that it was error to admit parol evidence that the company known by the name of the "Quicksilver Mining Company of New York," was doing business as a company *de facto* in California, but contended that proof should have been made that the laws of New York allowed corporations to be formed there for quicksilver mining, and that the corporation had no existence there.

In delivering the opinion of the court, McKinstry, J., said: "Defendant was indicted for feloniously stealing quicksilver, the property of the 'Quicksilver Mining Company of New York.'"

The prosecution proved by Rondel, that the company known by the name given in the indictment was a corporation *de facto*, doing business as such. This was sufficient. People v. Frank, 28 Cal., 507; People v. Hughes, 29 Id., 257; and People v. Ah Sam, 41 Id., 645.

In State v. Tumey, 81 Ind., 559, it was *held*, that where an agent of a foreign insurance company was prosecuted for embezzling money of the company, received by him as agent, it was no defence that he had not filed the certificate necessary in order to enable him legally to transact business in the State, and that, therefore, his transaction of business and receipt of the money was unlawful.

COMMONWEALTH v. CHARLES O. BERRY.

(99 Mass., 428.)

EMBEZZLEMENT.—If a servant fraudulently appropriate goods which were, at the time of such appropriation, in the possession of the master, whether actual or constructive, although in the custody of the servant, the crime is larceny.

A servant who receives goods from his master for a special purpose, has only the custody; the possession remains in the master.

Where a servant of a copartnership fraudulently appropriated money which he had received from one member of the firm, under, direction to carry it to another member. Held that he was not liable on an indictment for embezzlement.

Indictment, stated in the bill of exceptions to have been found on the Gen. Sts. C. 161, § 41, for embezzling bank bills of the amount and value of $950.

At the trial in the Superior Court, before Brigham, J., these facts appeared: The defendant was in the employ of a firm, consisting of Daniel Shaler and George W. Safford, and others, who had a furniture factory in South Boston, and a warehouse in the city of Boston proper. His special duty was to drive a team; but he was liable to perform any other kind of service which might be assigned to him by his employers. On the 20th day of July, 1867, Shaler directed the defendant to get $950 from Safford at the warehouse, and bring the same to Shaler at the factory. In pursuance of this direction, the defendant applied to Safford, for the money, and Safford delivered

the same to him, in a package of bank bills of the amount and value of $950. The defendant never carried the package to Shaler, but left the State; remained absent for several weeks; and on returning reported to his employers that, after receiving the money, he visited several tippling shops, became drunk and unconscious, and did not regain his senses until the morning of July 21, when he found himself lying in a doorway on Long Wharf, in Boston; that he lost the money during this period of drunkenness, and that on discovering the loss his shame was so great that he left without seeing his family, or any of his friends, and without telling anybody of his misfortune. There was evidence going to show that he left Boston on the 20th day of July, the day before the alleged drunkenness.

The defendant asked the judge to rule "as to the defendant's relations to his employers, and the delivery of the property to him, that said facts proved, if any crime, the crime of simple larceny, and not embezzlement; that, if embezzlement, it was embezzlement within the Gen. Sts., C. 161, § 28; and that said indictment could not be maintained under the evidence." The judge refused so to rule; and instructed the jury, on the contrary, "that, if the defendant was guilty, he was guilty of embezzlement as set forth in said indictment, and not larceny." The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. H. Bradley, for the defendant.

C. Allen, Attorney-General, for the Commonwealth.

HOAR, J. The bill of exceptions states that this indictment was found under Gen. Sts., C. 161, § 41. It seems to be a good indictment under that section, or under § 35 of the same chapter. Commonwealth v. Concannon, 5 Allen, 506. Commonwealth v. Williams, 3 Gray, 461.

But the more important question is, whether, upon the facts reported, an indictment can be sustained for the crime of embezzlement. The statutes creating that crime were all devised for the purpose of punishing the fraudulent and felonious

appropriation of property, which had been intrusted to the person, by whom it was converted, to his own use, in such a manner that the possession of the owner was not violated, so that he could not be convicted of larceny for appropriating it. Proof of embezzlement will not sustain a charge of larceny. Commonwealth v. Simpson, 9 Met., 138. Commonwealth v. King, 9 Cush., 284. In the case last cited, it is said by Mr. Justice Dervey that "the offences are by us considered so far distinct as to require them to be charged in such terms as will indicate the precise offence intended to be charged." If the goods are not in the actual or constructive possession of the master, at the time they are taken, the offence of the servant will be embezzlement, and not larceny." We see no reason why the converse of the proposition is not true, that, if the property is in the actual or constructive possession of the master at the time it is taken, the offence will be larceny, and not embezzlement. And it has been so held in England. Where the prisoner was the clerk of A, and received money from the hands of another clerk of A, to pay for an advertisement, and kept part of the money, falsely representing that the advertisement had cost more than it had; it was held that this was larceny, and not embezzlement, because A had had possession of the money by the hands of the other clerk. Rex v. Murray, 1 Mood., 276; S. C. 5, C. & P., 145. The distinction is between custody and possession. A servant who receives from his master goods or money, to use for a specific purpose, has the custody of them, but the possession remains in the master.

The St. 14 and 15 Vict., C. 100, § 13, provided that whenever, on the trial of an indictment for embezzlement, it should be proved that the taking amounted to larceny, there should not be an acquittal, but a conviction might be had for larceny. We have no similar statute in this Commonwealth.

In the present case, the defendant, who was employed as a servant, was directed by one member of the firm who employed him to take a sum of money from him to another member of the firm. He had the custody of the money, but not any legal or separate possession of it. The possession remained in his master. His fraudulent and felonious appropriation of it

was, therefore, larceny, and not embezzlement. Commonwealth v. O'Malley, 97 Mass., 584. Commonwealth v. Hays, 14 Gray, 62. People v. Call., 1 Denio, 120. United States v. Clesn, 4 Wash., C. C., 702.

In People v. Hennessey, 15 Wend., 147, cited for the Commonwealth, the money embezzled by the defendant, had never come into the possession of his master. And in People v. Dalton, 15 Wend., 581, the possession of the defendant was that of a bailee.

Exceptions sustained.

CHARLES F. GOODHUE v. THE PEOPLE.

(94 Ill. 37.)

EMBEZZLEMENT—JURISDICTION.—Upon the making of an order changing the venue of a criminal case, the jurisdiction of the court wherein such order is made ceases, and that of the court to which the case is sent attaches, by operation of law, and the jurisdiction of the latter court does not depend upon the ministerial act of the clerk awarding the change, and it is not defeated by his neglect to transmit the original indictment or papers.

Where a change of venue is awarded, if the clerk of the court fails or refuses to transmit the papers, with an authenticated transcript of the record, the court to which the venue is changed, and not the court awarding the change, is the forum to which application must be made to compel a performance of that duty.

While a party indicted for crime, upon a change of venue has a right to demand that he shall not be put upon trial until the original indictment is placed on file in the court to which the venue is changed, yet the failure to transmit the same is but an irregularity, which he waives by going to

trial without objecting on that account. The failure to transmit the original papers is only cause for a postponement of the trial, but no ground for a dismissal for want of jurisdiction.

An indictment against a county treasurer for embezzlement, which charges that the defendant, on, etc., then and there being county treasurer of said county, duly elected in pursuance of law to said office of public trust in said state, did feloniously and fraudulently embezzle a large sum of money, to-wit, the sum of $4,508.37, then and there in possession of such office, by virtue of his said office, contrary, etc., is sufficient even on motion to quash.

On an indictment charging the defendant with the embezzlement of money only, the admission of evidence showing the larceny or embezzle- of county orders is error.

If two or more offenses form part of one transaction, and are such in their nature that defendant may be guilty of both, the prosecutor will not, as a general rule, be put to an election, but may proceed under one indictment for the several offences, though they be felonies. The right of demanding an election, and the limitation of the prosecution to one offense, is confined to charges which are actually distinct from each other and do not form part of one and the same transaction.

In misdemeanors, within the discretion of the court, the prosecutor may be required to confine the evidence to one offense; or, when evidence is given of two or more offences, may be required to elect one charge to be submitted to the jury; but in case of felony it is the *right* of the accused if he demand it, except when the offences charged are all parts of the same transaction, that he be not put upon trial at the same time for more than one offence.

On the trial of an indictment of a county treasurer for the embezzlement of money in his hands as an officer, proof was given tending to charge the defendant as to at least three different transactions occurring at different times. On the close of the evidence for the people, the defendant moved the court to put the prosecution to their election as to which act of embezzlement they would claim a conviction, and further moved the court to limit the prosecution to some one act of embezzlement; which the court refused to do: *Held*, that the court erred in overruling such motions.

Where an indictment charges that an officer did actually embezzle, but does not charge that he took or secreted with intent to embezzle, which is made a distinct offence, it is error to instruct the jury to convict, if it be sufficiently shown that the accused did certain fraudulent acts with intent to embezzle.

Where it is made to appear that a defendant has been put to disadvantage from a failure to deliver to him in due time a correct list of the jurors composing the panel, as by statute required, or to give him a fair opportunity to prepare for trial, his conviction ought to be set aside; but a new trial should not be granted for every little inaccuracy that may occur in this regard, which works no injury to the accused.

On the trial of a county treasurer for embezzlement, the recitals of misconduct on the part of the accused, in connection with the order of remov-

al of the accused from office and the appointment of his successor, contained in the record of the proceedings of the county board, ought not to be given to the jury. Such recitals prove nothing. On such trial the tax warrant for the collection of taxes is not proper evidence for the purpose of showing the amount of tax to be charged against him, and is calculated to mislead the jury.

Writ of Error to the Circuit Court of Winnebago county.

The HON. JOHN V. EUSTACE, Judge, presiding.

This was an indictment against Charles F. Goodhue, for the crime of embezzlement, found under section 80 of the Criminal Code, which is as follows: "If any state, county, township, city, town, village, or other officer elected or appointed under the constitution or laws of this State, or any clerk, agent, servant or employee of any such officer, embezzles or fraudulently converts to his own use, or fraudulently takes or secretes with intent so to do, any money, bonds, mortgages, coupons, bank bills, notes, warrants, orders, funds or securities, books of record or of accounts, or other property belonging to or in the possession of the State, or such county, township, city, town or village, or in possession of such officer by virtue of his office, he shall be imprisoned in the penitentiary not less than one nor more than fifteen years." Rev. Stat. 1874, 363.

The following is the substance of the charging part of the several counts:

1. That Charles F. Goodhue, late of the county of Stephenson, on the 16th day of October, in the year of our Lord one thousand eight hundred and seventy-eight, in said county of Stephenson, in the State of Illinois aforesaid, then and there being county treasurer of said county of Stephenson, duly elected in pursuance of the laws of said State of Illinois to said office of public trust in said State, did feloniously and fraudulently embezzle a large sum of money, to wit, the sum of $4,508.37, then and there in possession of such officer by virtue of his said office, contrary, etc.

2. That the said Charles F. Goodhue, late of the county of Stephenson, aforesaid, on the said 16th day of October, of the year of our Lord one thousand eight hundred and seventy-eight,

in the county of Stephenson and State of Illinois, aforesaid, then and there being county treasurer of said county of Stephenson, duly elected in pursuance of the laws of said State of Illinois to said office of public trust in said State, did feloniously and fraudulently embezzle a large sum of money, to wit, the sum of $4,508.37 of the value of $4,508.37, then and there in the possession of such officer, him, the said Charles F. Goodhue, by virtue of his said, the said Charles F. Goodhue's office, contrary, etc.

3. That the said Charles F. Goodhue was duly elected to the office of county treasurer of the said Stephenson county in November, in the year of our Lord one thousand eight hundred and seventy seven, for the term of two years, commencing on the first Monday in December, in the year of our Lord one thousand eight hundred and seventy seven. That the said Charles F. Goodhue aforesaid, to wit, on the said first Monday in December, in the year of our Lord one thousand eight hundred and seventy seven, the same being the third day of December, in the year of our Lord one thousand eight hundred and seventy-seven, duly qualified and entered upon the discharge of the duties of his said office as county treasurer of said Stephenson county, and continued to hold and occupy said office, and discharge the duties thereof, from the said third day of December, in the year of our Lord one thousand eight hundred and seventy seven, until the 16th day of October, in the year of our Lord one thousand eight hundred and seventy-eight, when he was removed from said office by the board of supervisors of said Stephenson county, the said board then and there having lawful power so to do, and said Charles F. Goodhue, as such officer as aforesaid, was then and there succeeded in said office by one William W. Hutchinson, who was then and there duly appointed and qualified to fill the vacancy thereof. That while said Charles F. Goodhue was acting as the county treasurer of said Stephenson county, as aforesaid, he, the said Charles F. Goodhue, then and there received, collected and took into his possession as such officer, by virtue of his said office, a large sum of money to wit, the sum of $41,199.35, of the value of $41,199.35, and that the said Charles F. Goodhue, of the moneys by him so collected by virtue of his said office,

then and there in his possession as such office, did, at the county of Stephenson aforesaid, on the said 16th day of October, in the year of our Lord one thousand eight hundred and seventy-eight, feloniously and fraudulently embezzle the sum of $4,508.-37, contrary, etc.

The defendant moved to quash the indictment, on the following grounds: Irregularity in forming grand jury; vagueness of the indictment; that the several counts purport to be for the same offence; that the several counts plead the evidence; that the several counts charge no offence;—which motion the court overruled.

Mr. J. A. Crain, and Mr. E. B. Sumner, for the plaintiff in error:

1. The indictment is insufficient. The averment that the defendant did embezzle, is the averment of a legal conclusion. As is stated in Kribs v. The People, 81 Ill. 600, the indictment must set out the act of embezzlement. Embezzlement may be consummated by a variety of acts. The pleader is not allowed to give construction to act, or aver a conclusion, but must set out the acts themselves, so that the court can judicially see that those acts constitute a crime. Arch. C. P. P. p. 85, Waterman's ed., note 1; Hale P. C. vol. 2, pp, 183, 184; Hawkins P. C. p. 310 § 37; Archibald P. P. p. 86, note 1.

"The indictment must contain a complete description of such facts and circumstances as will constitute a crime." The indictment should have averred some manner of the embezzlement, as that he converted the money to his own use. "Did embezzle," is like the averment, "did unlawfully resist," which, in Lamberton v. The People, 11 Ohio, 282, was held to be the averment of a legal conclusion, and not of an act; or like the averment "did attempt to maim," which was held to be a statement of a legal conclusion, because maiming could be effected by a variety of acts, and this general averment did not name any one act. Com. v. Clark, 6 Grattan, 675.

Section 82, Rev. Stat. 1874, p. 360, does not help the pleader in this case, for, while that section does provide that where the property of "any person, bank, incorporated company or

co-partnerships" shall have been embezzled, it shall be sufficient to allege generally "an embezzlement,"—it is only in such case where the property is laid in some one of these specified owners, if properly even then, that the conclusion of law can be substituted for the acts themselves.

2. The indictment does not name any person as the party injured, or state that the property embezzled belonged to any one.

"The prosecutor or party injured, or any other person named in the indictment, if known, must be described with certainty; if an individual, he must be described by his christian or surname; if a corporation, by their name of incorporation." Pomeroy's Archibald, 245.

"The object of setting out the name of the party injured is to identify the particular fact or transaction on which the indictment has been founded, so that the accused may have the benefit on acquittal or conviction, if accused a second time." Pomeroy's Archibald, 245, note 2; ibid. 250, note 1; Wills v. The People, 1 Scam. 399; State v. Irwin, 5 Blackf. 343.

Section 74, Rev. Stat. 1874, p. 360, provides that any person may be guilty of embezzlement and larceny if he shall fraudulently appropriate any "*property delivered to him.*" An indictment would not be good averring this fact and no more; it should aver that such property delivered to him belonged to some person, and that there was, in reference to it, some person injured.

In an indictment for embezzlement, "unless the pleader is relieved from this exactness by a special statute, the goods and ownership must be set out with the same completeness as in larceny." 2 Wharton on Crim. Law, (7th ed.) § 1941.

See, also, Thompson v. The People, 24 Ill. 60, as to an indictment under the statute in respect to obtaining goods, etc., under false pretences.

3. The property alleged to have been embezzled is not sufficiently described.

Section 82, Rev. Stat. 1874, p. 360 provides that property embezzled need not be particularly described, provided it be the property of "any person, bank, incorporated company or co-partnership." Now, in this indictment the property embezzled is not averred as belonging to any such person, bank, cor-

poration or co-partnership; therefore, as the property embezzled is not embraced in this section by the terms of the averment, it must be described as required in an indictment for embezzlement without such a section. This principle is expressly decided in Com. v. Wyman, 8 Metc. 254.

4. As to the evidence: In one of the counts of the indictment there is an averment that the defendant was county treasurer, and embezzled funds, and, besides, the unnecessary averment that he was removed from his office by the board of supervisors because he was found to be a defaulter. This was purely surplussage. No averment upon that subject was necessary. The offence was complete without it. There are two ways in which defendant might take advantage of this: first, by moving, before trial, to strike out, and second, by objecting to evidence to sustain it.

Defendant did object, but, notwithstanding, the prosecution was permitted to introduce the records of the board of supervisors, not under oath, and *res inter alias acta*, which, in substance, declared the defendant guilty. This testimony under no circumstances could have been lawful testimony and under such circumstances it is the duty of the court to grant a new trial. Corbley v. Wilson, 71 Ill. 211; Whitaker v. Wheeler, 44 id. 441; Marshall v. Adams, 11 id. 41; Louisville & Nashville Railroad Co. v. Burns, 13 Bush (Ky.) 479.

Properly speaking, says Waterman in his New Trials, p. 613, the reception of illegal evidence should vitiate the verdict without inquiry as to its probable effect in any given case; its inevitable tendency is to mislead, and the extent of the mischief it may have done can not always be calculated or guessed at. . . . When illegal testimony is such as to be in gross violation of well settled principles, which govern proof, clearly giving the party who offered it an unlawful advantage, its admission has been held *per se* a ground for a new trial, whether the jury were directed to disregard it or not. Wicks v. Lowerre, 8 Barb. 535.

5. The prosecution should have been put to their election as to which count of the indictment they would claim conviction upon.

The several counts of the indictment purported to be for one

and the same transaction, to wit: embezzling $4,508.37, in defendant's possession as county treasurer. Nothing on its face apprised defendant that he was to be tried for distinct felonies.

In Warnock v. State, 7 Cold. 508, where distinct offences were sought to be proved, and evidence offered of the same without objection, and the court refused to put the prosecution to its election, the Supreme Court reversed the judgment for that reason. 1 Wharton on Crim. Law (7 ed.) 423.

If it be not proper to include seperate and distinct felonies in different counts of the same indictment, certainly when the several counts of an indictment purport to be for the same offence, to permit the prosecution, under such indictment, to give proof of, and insist on a conviction for several and distinct offences, violates the very principle laid down by this court. Lyons v. People, 68 Ill. 275.

6. The Winnebago circuit court did not have jurisdiction. The certificate of the clerk of Stephenson county is wholly insufficient, and no better than none. It not only does not certify what was contained in the record during the pendency of proceedings in Stephenson county, but it fails to identify the indictment or transcript of record, or any of the other papers, as the originals, or as those sent to Winnebago county. It is no better than no certificate; yet it imports verity, and the court can not make another certificate for the clerk.

The section of the statute which provides that objection to proceedings in obtaining changes of venue, or the right of the court to which the change is made to try the case and pronounce judgment, shall be considered as waived after trial and verdict, has no application.

Mr. James S. Cochran, States Attorney, for the People:

1. At common law, an indictment for embezzlement was required to set out each specific act of embezzlement, and the same rule applies under our statutes which makes embezzlement larceny. Kribs v. People, 81 Ill. 600. But the statute under which the indictment was drawn does not declare that the person guilty of embezzlement shall be deemed guilty of a larceny.

2. Every indictment shall be deemed sufficiently technical and correct which states the offence in the language of the stat-

ute, or so plainly that the nature of the offence may be easily understood by the jury. Rev. Stat. 1874, p. 408 § 408; Canady v. People, 17 Ill. 158; Morton v. People, 47 id. 468; Mapes v. People, 69 id. 523; McCutcheon v. People, id. 601; People v. McKinney, 10 Mich. 54.

3. It is also objected that the indictment does not state the name of any party injured or to whom the money belonged. The statute makes it criminal for any officer to embezzle money "*in the possession of such officer by virtue of his office.*" See State v. Mason, 62 Maine, 106; State v. Orwig, 24 Iowa, 102; Brown v. State, 18 Ohio St. 506; People v. McKinney, 10 Mich, 54; State v. Smith, 13 Kan. 274.

4. If copies, and not originals, are sent on change of venue, objection must be made at the earliest period, or the irregularity will be waived. Holliday v. People, 4 Gilm. 111; Granger v. Warrington, 3 id. 299; McKinney v. People, 2 id. 556.

All objections to the jurisdiction arising from a defective certificate of the proceedings are waived by going to trial without objection. Hitt v. Allen, 13 id. 79; Perteet v. People, 70 id. 172; Gardener v. People, 3 Scam. 87; Loper v. State, 3 Hon. (Miss.) 429.

5. As to the right of the defendant to compel the prosecution to elect as to what charge it would urge for a conviction, counsel cited 1 Wharton. Crim. Law, sec. 423; People v. McKinney, 10 Mich. 95; Leonard et al. v. People, 81 Ill. 308; People v. Davis, 56 N. Y. 100; George v. State, 39 Miss. 590; Garatt v. State, 25 Ohio St. 162; Bish. Crim. Proced. 425, 454 and 459.

Mr. Justice DICKEY delivered the opinion of the Court:

This is an indictment against plaintiff in error, under section 80 of the Criminal Code, found by a grand jury of the county of Stephenson at the December term, 1878. The indictment consists of three counts, in each of which plaintiff in error was charged with the embezzlement of $4,508.37, of money in his possession by virtue of his office as county treasurer.

The circuit court of Stephenson county overruled a motion to quash this indictment, and a plea of not guilty being interposed, the venue was changed to the county of Winnebago by order of the court, on the application of the accused.

A transcript of the record of the proceedings in the circuit court of Stephenson county, embracing a copy of the indictment, was transmitted by the clerk of that court to the clerk of the circuit court of Winnebago county, and duly filed in his office on the 2d day of January, 1879. This transcript was authenticated by the certificate of the clerk of the circuit court of Stephenson county, under the seal of that court, as "a true, perfect and complete copy of the record in a certain cause lately pending in the circuit court of the county of Stephenson, wherein the People is plaintiff and Charles F. Goodhue is defendant."

At the January term of the circuit court of Winnebago county a trial was had, resulting in a verdict of guilty, fixing the term of imprisonment in the penitentiary at four years; and in a further finding of the jury (as the verdict reads) "from the evidence in our hands," that the defendant embezzled the sum of $3,812.

Motions for new trial and in arrest were made and overruled, and sentence and judgment were entered upon the verdict.

It is insisted by plaintiff in error that the circuit court of Winnebago county did not acquire and did not have jurisdiction to try this case, because the original indictment was not before that court as required by law.

We can not sustain this position. On the making of the order changing the venue by the circuit court of the county of Stephenson the jurisdiction of the court ceased, and that of the circuit court of Winnebago attached, by operation of law. Had the clerk of the court of Stephenson county refused to transmit the papers with an authenticated transcript of the record, the circuit court of the county of Winnebago, and not that of Stephenson county, would have been the forum to which application could be made to compel the performance of that duty. The jurisdiction of the court in the county of Winnebago in no sense or degree depended upon the ministerial act of the clerk of the circuit court of Stephenson county. The failure of the clerk to transmit the original papers forming part of the record in the case was a grave irregularity. The accused had a right to demand that he should not be put upon trial until such original papers were placed on file in the circuit court of

Winnebago. It is, however, such an irregularity as may be waived by the accused. In this case it was waived. The accused, when put upon trial, did not object on that ground to going on with the trial. It is true he objected to going to trial upon the ground of the absence of a witness, but did not call the attention of the court to the absence of the original indictment. Had he so done it would have shown good ground for postponing the trial, but not ground for dismissing the cause for want of jurisdiction. Not having presented that ground upon his application for a continuance, he could not, after trial, be heard to complain of the irregularity.

It is objected that the indictment, on its face is bad. A majority of the court are of the opinion that the indictment is sufficient.

In the course of the trial evidence was produced tending to prove that certain county orders were ordered to be issued, and that the county clerk, having prepared and signed the orders (which were prepared on blanks for that purpose, contained in a book,) left the book containing the orders, so signed by the clerk, in the treasurer's office, for the purpose of having the treasurer countersign the orders; and that plaintiff in error, having countersigned these orders as treasurer, cut a part of them out of the book, amounting to some $2,200, and took them to a bank and sold them for about that amount of money, and failed to charge himself with that amount in his official accounts, but fraudulently converted the same to his own use.

This evidence was admitted by the court against the objections of the accused, and after all the evidence on that subject was given, a motion was made to exclude the same as inadmissible under this indictment, and this motion was denied. This, we hold, was error. The indictment charged the embezzlement of *money*, and did not charge the embezzlement of county *orders*. If this disposition of the county orders was made criminally, it constituted either the larceny or the embezzlement of the county orders, and not money. The county treasurer *as such* had no authority to sell these orders for the county and receive the proceeds as the money of the county. The issue and sale of county orders is neither of them, embraced among the official duties of the county treasurer, nor is there any

proof whatever tending to show that the county board made him in any way the agent of the county to issue or sell these orders for the county. The order of the county board authorized the county clerk to issue them, and the law required the orders to be countersigned by the treasurer.

It is plain that if a crime was committed by the accused in this transaction in relation to what are called the "jail orders", as presented by the proofs, it was not embezzlement of the proceeds of the orders, but the embezzlement or larceny of the orders themselves. If a man steal a horse and sell him to a stranger, he may be convicted of stealing the horse, but not of stealing the money received as the price of the stolen horse.

The county orders were in the lawful possession of the county clerk, although placed for the purpose of being countersigned in the room where the county treasurer kept his office. They were in process of preparation for issue, but seem never to have been issued by the clerk.

Upon the proofs, this transaction did not fall within the description in the indictment. The evidence relating thereto ought to have been excluded from the jury,—and the 16th instruction on the subject ought to have been given.

In the course of the trial evidence was given tending to charge the plaintiff as to at least three different transactions, each of which the court charged the jury was, if established, a complete crime, for which they must convict. One related to the witholding some $540.31 from the city treasurer of Freeport, and occurred in the month of July, 1878. Another transaction had relation to a false receipt given in the month of May, 1878, to one Potter, saying defendant had paid him $383 for printing, when in fact but $283 was paid, and to the entry of credit on the collector's books of a credit for the former amount. And another tranaction related to the improper conversion or use of certain county orders, called jail orders, which is said to have occurred in the month of September, 1878.

By one instruction (the 9th) the jury were told that they must convict defendant if he held in his hands, as such county treasurer and by virtue of his office, the sum of $7,017.14 belonging to the city of Freeport, and while he so held such funds the treasurer of that city, as such, demanded of defendant, as

such county treasurer, all the money in his hands belonging to said city; and that defendant then and there fraudulently told such city treasurer that $6,476.83 was all of such money, when in fact there was the further sum of $54.31 in the hands of defendant belonging to such city; and defendant then and there fraudulently withheld from said city treasurer the latter sum, with intent to defraud the said city of that sum, and if defendant fraudulently converted the same to his own use "then the jury shall find defendant guilty," etc.

By another instruction (the 8th) the jury are directed to convict the defendant if, while the county owed to one Potter only the sum of $283 for printing a delinquent list, defendant, as county treasurer, paid that sum and no more to Potter for such services, and then and there fraudulently obtained from Potter a receipt for the sum of $383, being $100 more than the actual amount paid to Potter; and if defendant then and there knowingly, falsely and fraudulently gave himself credit on that account on his books as county collector with the sum of $383, with intent fraudulently to convert to his own use the $100 which was the excess of the receipt and of the credit upon the books over and above the amount actually paid to Potter.

By another instruction the (16th) the jury were directed to find the defendant guilty if certain jail orders, numbered 208, 209, 210, 211 and 212, were issued by the county, and, in pursuance of some arrangement between the officers of the county and a certain bank, certain money, the avails of such orders, came into defendant's hands as county treasurer, and if defendant fraudulently failed to charge himself therewith on the treasurer's books, and embezzled the same or any part thereof.

The transactions to which these instructions respectively related are distinct and separate in so far as the proofs tend to show.

After the evidence was closed, the accused, by his counsel, applied to the court to put the prosecution to their election as to which act of embezzlement they would claim a conviction, and moved the court to limit the prosecution to some one act of embezzlement. This the court refused to do, but gave the several instructions mentioned *supra*.

If two or more offences form part of one transaction, and are

such in nature that a defendant may be guilty of both, the prosecution will not as a general rule be put to an election, but may proceed under one indictment for the several offences, though they be felonies. The right of demanding an election and the limitation of the prosecution to one offence, is confined to charges which are actually distinct from each other and do not form parts of one and the same transaction. In misdemeanors the prosecution may, in the discretion of the court trying the case, be required to confine the evidence to one offence, or where evidence is given of two or more offences, may be required to elect one charge to be submitted to the jury, but in case of felony it is the right of the accused, if he demand it, that he be not put upon trial at the same time for more than one offence, except in cases where the several offences are respectively parts of the same transaction. 1 Wharton Crim. Law, § 423; 1 Bishop Crim. Pr. 459. This doctrine is recognized by this court in Lyons v. The People, 68 Ill. 275, and is believed to accord with the practice in this State from its earliest days. It was therefore error, in this case, to refuse the application of the accused for the benefit of this rule.

Again the statute in question defines two offences,—one, the actual embezzlement of public funds, and the other, the taking or secreting of public moneys with intention to embezzle, and does not charge that he took or secreted with intent to embezzle. In several of the instructions given by the court this distinction is not observed, and the jury were directed to convict if it be shown sufficiently that the accused did certain fraudulent acts with intent to embezzle. This is error.

We think, also, that the recitals of misconduct on the part of the accused contained in the records of the proceedings of the county board, in connection with the removal of the accused from office and the appointment of his successor, ought not to have been given to the jury,—certainly not without definite caution to the jury that they must not be taken as proof in the slightest of the truth of the recital. It is said, for the prosecution, these recitals were necessary to show the validity of the order of removal. We do not think so. The statute gives the power of removal on the happening of certain contingencies. The statute does not require such contingencies to be stat-

ed in the record of the proceedings. Such recitals of the record are not proof that the contingencies occurred. Nor do we perceive, from the statement of the evidence in the abstract, that any material lawful purpose could be subserved by proof of his removal from office and the appointment of his successor. It is shown that his successor sent the accused a letter demanding that he turn over all the moneys, property, books, etc., belonging to the office of county treasurer, but our attention has not been directed to any proof as to whether the accused did or did not comply with this request, and without this proof the fact that he had a successor is of no significance.

Again, the tax warrant for the collection of taxes was put in evidence, as it would appear, by way of showing the state of accounts of the treasurer, and in the account presented by the prosecution, the amount of taxes to be collected, as mentioned in the collector's warrant is presented as an item with which the accused should be debited, and this, as it is said, for the purpose of showing the amount of money which actually came to his hands. The tax warrant was not competent proof for the purpose. Such proof, if competent in this case, would charge the accused with embezzlement of any amount of tax which he, from his own fault, failed to collect. In determining the amount which a county collector shall be called upon to account for in his settlement with the state, county and other authorities, this item is a proper debit to head the account, for, if the collector has, from his own fault, failed to collect any given amount in that warrant, he must account for the same in such settlement. Not so in a trial for embezzlement of money actually received and appropriated to his own use. The introduction of this tax list was calculated to mislead rather than enlighten the jury on the issue. An officer may be a very gross defaulter and yet not an embezzler or a thief. In fact, an honest man is liable to become a defaulter from his negligence or for his incompetency. These matters must not be confounded with crime.

Complaint is made that the list of jurors furnished to the accused was not correct. The list furnished contained thirty names instead of twenty-four. Six of the men whose names were so given were of the jurors drawn for the term, but some of them had not been served and others had been excused; none

of them were *at that time* on the panel of jurors, and as to one man who was of the panel as composed when the trial began, his name was A. F. Nichols, but he was summoned by the sheriff by the name of Burt Nicholds, and on the list furnished the accused he was put down as "Burt Nicholds."

The utmost care should be taken to give to every defendant in criminal cases every reasonable opportunity to prepare for trial, and among other things to notify them in due time as to what men constitute the panel out of which the jurors for his trial are to be called, and whether it is made to appear to the court that a defendant has been put to a disadvantage from a failure in this regard, his conviction ought to be set aside. It is not, however, every little inaccuracy which may occur in this regard for which a trial should be set aside. In this case it seems plain that the accused suffered no injury from the irregularity. He could readily see that the list contained thirty names, and might have called the attention of the court to that fact and had the list corrected.

For the errors indicated, the conviction and judgment must be set aside, and the cause remanded to the circuit court of Winnebago county for a new trial.

Judgment reversed.

SCOTT J. I do not concur in this opinion except so far as it holds the indictment is sufficient.

NOTE.—A servant, clerk or agent may be charged with the embezzlement of several different sums of money, or articles of security which have been fraudulently converted by him at different times extending through the whole period of his employment, and upon trial the people will not be required to elect as to any particular item.—[Ker v. People, Ante. p. 25.

STATE v. BOODY.

(53 N. H. 610 Sup. Judc. Ct.)

EMBEZZLEMENT.—Every municipal corporation is necessarily a *public corporation*. All corporations intended as agencies in the administration of civil government, are *public* as distinguished from private corporations.

The words "any officer, agent, or servant of any corporation, public or private," includes a selectman or any other town officer, or the general or special agent of any town.

The indictment, charges that Charles H. Boody, at New Durham, in said county, on the tenth day of March, 1868, being, then and there a public officer and receiver of public money, to wit, a selectman of said town of New Durham, did then and there, by virtue of his said office of selectman as aforesaid, have, receive, and take into his possession certain money to a large amount, to wit, to the amount of two hundred and seventeen dollars, and of the value of two hundred and seventeen dollars, of the property and moneys of said town of New Durham, the same being public money; and the said Charles H. Boody the said money then and there did embezzle, and fraudulently convert to his own use, contrary, etc. To this indictment the defendant filed a general demurrer.

Clark (Attorney General) for the state.

Briggs & Huse, for the respondent.

It was claimed, for the defendant 1st. That a selectman was

not a public officer and by virtue of his office a receiver of public money. 2. That the indictment did not sufficiently describe the offence, and for that reason was void.

FOSTER, J. The 257th chapter of the General Statutes relates to "Frauds and Embezzlements," and is so entitled. Its 7th section provides for the punishment of "any public officer, being a receiver of public money," who shall fraudulently convert the same to his own use. Its 8th section provides for the punishment of "any officer, agent, or servant of any corporation, public or private, or the clerk, agent, or servant of any person," who shall be guilty of a similar offence.

The indictment before us is founded upon one of these sections.

In the Revised Statutes, from which both sections were taken, the former is included in a chapter entitled "Offences against the State." It is chapter 213, section 4, and its terms are substantially the same as those of sec. 7, ch. 257, Gen. Stats. The other sections of the chapter in the Revised Statutes relate to treason and misprision of treason solely. Section 4 would seem, from this connection, to have had special reference to state officers,—that is officers whose duties concern the state at large or the general public (see Dillon Mun. Corp. sec. 33,) and not to officers of municipal corporations.

The Revised Statutes, unlike the General Statutes, contain no independent chapter or title relating to embezzlements; but they contained the provisions of sec. 8 of ch. 257, Gen. Stats. where they were applied exclusively to officers of banking corporations. Rev. Stats., ch. 140, secs. 40, 41.

Under the Revised Statutes, then, and until the enactment of the General Statutes, it would seem that a selectman could not be punished for embezzlement of town funds, unless, by virtue of the provisions relating to a "receiver of public money," in the chapter of "Offences against the State" already referred to, where the crimes of treason and embezzlement of public money are alone considered. But, by the terms of the General Statutes, ch. 257, sec. 8, the penalties prescribed for the embezzlement of bank funds, by officers of banks, were extended to "any officer, agent, or servant of any corporation, public or private;" and it would seem that, under this section,

a selectman or any other town officer, or the general or special agent of any town, might be punished for the embezzlement of its funds, and that an indictment found upon that section might be applied to a case like the present.

Doubtless it was for the purpose of curing this defect in the law that the restricted provisions of secs. 40 and 41, of ch. 140, Rev. Stats., were "made general" by the commissioners in the revision of 1867. See report of the commissioners.

This application of the statute to the agent or servant of any corporation, public or private, fixes the liability of every town officer who shall embezzle the public funds. It is true that, in common legal parlance, towns are not usually spoken of as corporations, without the prefixed adjective "municipal." They are frequently spoken of as *quasi* corporations, and, by sec. 1, of ch. 133, Gen. Stats., the provisions of Title XVII., comprehending those ten chapters which are supposed to include all general legislation concerning corporations, do not apply to public municipal corporations, such as towns, cities, and the like.

But the terms of the statute relating to embezzlements are not restricted nor defined by the application and definitions of the provisions of Title XVII; and, as used in sec. 8, of ch. 258, Gen. Stats., the term "public corporation" may properly be applied to a town.

Of this there can be no doubt. Every municipal corporation is necessarily a public corporation. "All corporations intended as agencies in the administration of civil government, are *public* as distinguished from private corporations. Thus, an incorporated school district or county, as well as a city, is a public corporation; but the school district or county, properly speaking, is not, while the city is, a *municipal* corporation. All municipal corporations are public bodies, created for civil or political purposes; but all civil, political, or public corporations are not, in the proper use of language, municipal corporations." Dillon Mun. Corp. sec. 10.

In this state, public corporations are understood to include all those which are created for public purposes, and whose property is devoted to the object for which they are created. Such, it is said, are counties, towns, parishes, school districts,

&c. Private corporations are those which are created for the immediate advantage of individuals. Such, it is said, are insurance and manufacturing companies, and such, also, are canals, turnpikes, toll-bridges, and railroads, although the uses of these latter are public. Dartmouth College v. Woodward, 1 N. H., 116, 117; Eustis v. Parker, 1 N. H., 275; School District v. Blaisdell, 6 N. H., 199; Concord Railroad v. Greeley, 17 N. H., 47; Foster v. Lane, 30 N. H., 305; Petition of Mt. Washington Road Co. 35 N. H., 134.

It may not be entirely certain upon which of the two sections, 7 and 8, the public prosecutor relied in framing the indictment. He seems to have incorporated the language of both in the description of the official position of the respondent. He is called a public officer, and also a receiver of public money, to wit, a selectman; and he is charged with the embezzlement and fraudulent conversion of public money.

Omitting the superfluous and unnecessary words "and receiver of public money," such an officer is clearly included within the provisions of section 8; and, under that section, with proper averments in the indictment, the respondent would properly be chargeable.

But it seems more probable that the prosecuting officer intended, by the framing of his bill, to charge the respondent under section 7, since he has used, in his description of the offender, the terms a "public officer" and a "receiver of public money,"—terms that are not employed in section 8, which applies in terms to "any officer, agent, or servant of any corporation, public or private." And we can have little doubt that the later compilers of the statutes, and the legislature of 1867, intended to enlarge the provisions of the Revised Statutes, ch. 213, sec. 4, by extending them to municipal corporate agents; not confining them to state officers. This is indicated by the collection of sec. 7, ch. 257, Gen. Stats., which (while its phraseology is retained without modification) is extracted from the chapter entitled "Offences against the state" in the Revised Statutes, and where, as we have seen, it is associated with no other subjects than treason and misprision, and incorporated into the chapter entitled "Frauds and Embezzlements," where it be-

comes associated with kindred subjects, while the remainder of the chapter from which, as section 4, it is taken, is re-enacted in the General Statutes under the title of "Treason and Misprision." Gen. Stats. ch. 265.

If, then, section 7 of ch. 257, Gen. Stats., may be applied, as we think it well may, to the servant or agent of a municipal corporation, the offender and the offence are described in this indictment fully and plainly, substantially and formally. It would be ridiculous to require the state to prove the precise source from which the money taken and converted was derived. The money in the officer's hands may have come from various sources, and have been so mingled and confused as that the portion thereof embezzled and converted could by no possibility be designated, such fund having no ear mark.

By the terms of the statute, any public officer, being a receiver of public money, who shall fraudulently convert the same to his own use, shall be punished.

By the terms of the indictment, the respondent is described as being a public officer and receiver of public money, to wit, a selectman, &c., and is charged with fraudulently converting to his own use a specified sum, being the property and money of the town, which, as selectman, he had received.

The word "embezzle" is used in the indictment, but this may be rejected as surplusage, since it means no more than the offence, which is fully described by the use of other terms. See Bour. Law Dic. Embezzlement.

Selectmen are not *ex officio* receivers of the public money of the town, but they are invested with the functions of a treasurer upon the failure of the town to elect such an officer. Gen. Stats. ch. 37, sec. 4. So, too by special vote of a town, a selectman may be constituted the agent of the town to receive, as well as to hold and appropriate, the funds of the town (Barnstead v. Walker, Belknap, December Term, 1872,) and in such a case he would come under the statutory designation of "a public officer, being a receiver of public money."

Moreover, in certain cases (in one case at least) selectmen are especially constituted receivers of the town's money, as in Gen. Stats. ch. 53, 8, where the collector is required to collect

the taxes and pay the same "to the state and county treasurer, *and to the selectmen* or town treasurer."

Demurrer overruled.

NOTE.—In Bork v. the People, 91 N. Y., 5, the indictment under which defendant was convicted, after averring in the first count the incorporation of the City of Buffalo, and that during the time mentioned in the indictment, Thomas R. Clinton was comptroller of the city, and as such, held for and on behalf of the city, two hundred unpaid and unsatisfied bonds, known as city and county hall bonds, of the denomination and value of $1,000 each, the "credits, funds and property" of the city, then charges that on the first day of October, 1875, at Buffalo, the defendants, with intent to defraud the said City of Buffalo, etc., then and there feloniously, wickedly and wrongfully did obtain and receive from Thomas R. Clinton, such officer as aforesaid, etc., and did convert to his, said Joseph Bork's own use and dispose of one hundred bonds of the City of Buffalo, . . issued by said City of Buffalo . . &c., of the kind known as city and county hall bonds, in and by each of which bonds the said City of Buffalo promised and agreed to pay the sum of $1,000, with interest thereon, each being dated, . . . and of the denomination and value of $1,000 each, a further and more particular and accurate description of which is to the jurors unknown, . . of the funds, credits and property of said City of Buffalo, etc., then and there so as aforesaid, held by said Thomas R. Clinton, as such office, . . . offically for and on behalf of said city, contrary to the form of the statute." The second and third counts are found upon the same transaction set forth in the first count. It was shown on the trial that Bork was treasurer of the City of Buffalo, from July 1, 1872, to January 1, 1876, having been elected to that office for two successive terms of two years each. In December, 1875, it was discovered that Bork was a defaulter to the city, and an investigation was instituted, in the course of which it was ascertained that his defalcations amounted to about the sum of $475,000. When the defalcations commenced, does not definitely appear. The money was to a great extent turned over or deposited by him with the firm of Lyon & Co., a firm engaged in real estate and broking business in the City of Buffalo, of which Bork was a member, and was used in their business. The firm of Lyon & Co. had no capital, and when the defalcation of Bork was discovered, it was found to be insolvent. The issue of the bonds was authorized by an act of the legislature, chap. 680 Laws of 1871, and on the 23d day of August, 1875, the mayor and comptroller were, by resolution of the common council, authorized to issue said bonds. The bonds were duly executed by the mayor and comptroller, under the seal of said city and deposited with the comptroller, who on or about the 20th day of September, 1875, delivered to Bork seventy-five thousand of the bonds, to be sold by him on account of the city. Bork sent them through a bank in Buffalo to a bank in the City of New York, subject to his order. He went to New York the same day, received the bonds from the bank there and put them

into the hands of one Moran, a broker, with directions to sell the bonds and credit the proceeds of twelve of them to Lyon & Co., on their account with Moran, and to deposit the proceeds of sale of the remaining sixty-three bonds in the Bank of New York, to the credit of the Bank of Commerce of Buffalo, one of the deposit banks designated by the common council of Buffalo for the deposit of the city funds. The bonds were sold by Moran, who deposited the proceeds as directed, the Bank of Commerce credited the amount to Bork as treasurer. Bork made no entry in the treasurer's book of the sale of the bonds. He neither charged himself with the bonds nor credited the city with the proceeds. The credit in the Bank of Commerce did not disclose the source from which it was derived.

The above indictment was found under the act of February 17, 1875, entitled, "An act to provide more effectually for the punishment of peculation and other wrongs affecting public money and rights of property." The first section, is as follows: § 1. "Every person who, with intent to defraud, shall wrongfully obtain, receive, convert, pay out, or dispose of, or who with like intent, by willfully paying, allowing, or auditing, any false or unjust claim, or in any other manner or way whatever shall aid or abet any other in wrongfully obtaining, receiving, converting, paying out, or disposing of any money, funds, credits, or property held or owned by this state, or held or owned officially or otherwise, for or on behalf of any public or governmental interest, by any municipal or other public corporation, board, officer, agency, or agent of any city, county, town, village, or civil division, sub-division, department, or portion of this state, shall, upon conviction of such offence, be punished," &c. *Held*. 1. That it was not necessary to prove that the defendant did all the specified acts charged in the indictment, to justify a conviction. 2. That it was sufficient to prove that he did any one of the acts constituting the offence. 3. That the delivery of the bonds to a broker in New York, for sale, accompanied with a direction to credit the firm of Lyon & Co of which Bork was a member, with the proceeds of the sale, was a clear conversion of the bonds. 4. That the act applies to cases within the general language, whether the offender is an officer, agent or servant, having the custody of the funds charged to have been misappropriated, or owing a special duty in relation thereto, or a private individual having no official or other confidential relation to the state, or municipality defrauded by his acts, and that offences punishable by existing laws were not excluded from the purview of the act, and that it was competent for the legislature to provide, by an independent statute, that certain acts of embezzlement, punishable by the existing statutes, should constitute a distinct offence, and fix a severer punishment than was provided by the general law relating to that class of offences. 5. That the bonds having been received by defendant complete in form and capable of becoming efficient instruments by delivery to a *bona fide* holder, though unissued, are property within the meaning of the statute. 6. That it was not necessary to aver in the indictment, that the bonds were held on behalf of "any public or governmental interest."

In State v. Ring, 29 Minn., 78, the indictment alleges that the defendant

was county treasurer until a certain date, that on a certain date thereafter A. was appointed and qualified, and became the successor of the defendant, and has since been county treasurer, and that the defendant, upon A's demand, refused to hand over the money received by him. An appointment was not valid unless there was a vacancy, and there was no specific allegation of a vacancy. *Held.* 1. That the general allegation that A. was defendants successor was sufficient, and that the indictment should not be considered as assuming to set forth the several steps by which A. became treasurer. 2. That a demand by defendant's successor in office of "all the public money, books, accounts, papers, and documents," without specification of the particular sum demanded, was sufficient and that the extent of the embezzlement, was to be determined by proof of the sum then in defendant's hands. 3. That an allegation charging defendant with the embezzlement of money "exceeding the sum of $38,000" was sustained by proof of the embezzlement of $19,140, that although part of the amount received by defendant, was in orders which he was allowed, by law to receive, it was not necessary to prove the specific sum received in money. 4. That where certain tax receipts were found in possession of defendant, the stubs corresponding to which had been turned over to the county auditor, did not show that the tax had not been paid. 5. That it was not necessary to prove defendant's eligibility to the office of county treasurer, unless it was denied.

In State v. Walton, 62 Maine, 106, the indictment alleged that the defendant, on the first day of December, 1871, was a public officer, to wit, the collector of taxes of the town of Alton, and that, by virtue of, and while employed in that office, he received and had in his possession and control, nine hundred dollars of the property of the inhabitants of Alton, and fraudulently embezzled and converted it to his own use; the second count averred that the defendant not being an apprentice, nor below the age of sixteen years, having in his possession and under his care by virtue of his employment, bank bills, the property of said inhabitants, of the value of one thousand dollars, did embezzle and convert the same to his own use, and took and secreted these bills with the intent to embezzle them and convert them to his own use. The first count concluded with an averment that by such embezzlement the defendant did feloniously steal, take, and carry away the money so in his custody as collector. A demurrer filed by the defendant was overruled.

The Revised Statutes upon the subject of embezzlement declares:

I. The embezzlement, or the fraudulent conversion to his own use, or the taking and secreting with that intent of the property of another, in the possession of the offender, or under his care by virtue of his employment, committed without the consent of his employer or master by any officer, clerk, or servant of a person, copartnership, or corporation, the offender not being an apprentice, nor less than sixteen years of age, is to be deemed larceny.

II. If a public officer, or an agent, clerk, or servant of a public officer, embezzles or fraudulently converts to his own use, or loans, or permits any person to have or use for his own benefit, without the authority of

law, any money in his possession or under his control, by virtue of his office or employment by such officer, he shall be deemed guilty of larceny, and be punished accordingly.

III. The same result follows as to him who, without authority of law and with intent to convert the same to his own use, knowingly receives from a public officer, or his clerk, servant, or agent, any money in the possession or under the control of such officer by virtue of his office.

BARROWS, J. who delivered the opinion of the court, among other things said: "More or less of the elements necessary to constitute the crime of larceny, as elsewhere defined, are wanting in each of these cases. But it was clearly competent for the law-making power to extend the definition of the offence, so as to include these cognate cases. This they have done. In order to ascertain whether an indictment can be maintained against an offender of either of these three classes, one must look to see whether it includes allegations of those facts which the legislature have declared essential to constitute the offence which it purports to charge. Beyond these we are not to seek. It is not for the court to require either allegation or proof of that which the legislature have omitted in their definition of the crime, nor to carry that which is descriptive of one class of offences, into either of the others, as an essential requisite."

"When the legislature is declaring what kind of embezzlement or fraudulent conversion shall be deemed larceny in an officer, agent, clerk, or servant of a person, copartnership, or corporation, it is careful to say that it must be of the property of another, in the possession or under the care of the offender by virtue of his employment, and that it must be shown that it was without the consent of his employer or master, and that the offender is not an apprentice, nor less than sixteen years old; and these various conditions must appear in the indictment and be supported by the proof when a case of this class is under consideration.

But several of these conditions are omitted in declaring what embezzlements or fraudulent conversions by a public officer shall constitute larceny. As against such an officer, it is sufficient to allege and prove the fraudulent conversion to his own use of any money that comes into his possession or under his control by virtue of his office. As against a public officer the allegation of these acts and facts will suffice without going further, and without alleging that the money was the property of another, or whose money it was, or that the offender was not an apprentice, nor less than sixteen years old, or that he appropriated the money without the consent of any of the inhabitants of the municipal corporation whose officer he was. We need not follow the ingenious refinements of the defendant's counsel upon the question of the ownership of the money, nor consider here the effect of the decisions that the collector must account for it to the town, according to the terms of his bond, though it has been lost without his fault, and other decisions that seem to imply that in a certain sense, and for certain purposes, he may be considered the owner of it himself. The questions here are: Was he a public officer? Has he fraudulently converted to his own use money which he had in his possession and under his control, by virtue of his office? It is set forth in the

had a right, but no duty, to pay a public officer to whom the collector of taxes of the town of Alton did, by virtue of his office and without proper warrant, receive and have in his possession certain money to a large amount to wit the amount of nine hundred dollars, of the property of the town of Alton and the said money did then and there unlawfully and feloniously embezzle and convert to his own use and so did steal, take and carry away by force. The defendant's demurrer admits the facts as set out, and it is contended on his behalf that there was no larceny because in the very nature of the case there was no actual taking and carrying away of the money from the possession of the inhabitants of Alton as owners, it was not, perhaps, to all intents and purposes their property, before it had been paid in to their treasurer. It is not necessary for us to decide whether it was or not. It may have been properly a matter of technical difficulty in determining to whom money was actually belongs but the legislature omitted to require it. It is granted by this statute because to whomsoever it belonged, it came to this defendant's possession and into his control, by virtue of his office when it was received. His statute makes the fraudulent appropriation of it to his own use in violation of his official oath, tantamount to larceny, and punishable as such, though there is no felonious taking and asportation from the possession of the owner, and though the fraudulent official and his sureties may be held bound by his contract with the town to account for it under circumstances when an ordinary bailee would be excused. If necessary, the allegation as to the ownership of the money might be treated as surplusage. It was the fraudulent breach of official duty and trust, which our statute does not be held to amount to larceny, the legislature aimed to punish. The collectors of taxes are public officers there can be no doubt. They are specially mentioned among those that are to be chosen at the annual town meetings in pursuance of R. S. c. 3, § 10. Even in the absence of such special statutory recognition, they have been so regarded, and held liable to the penal provisions of statutes of like character with that under which this indictment is found."

"In the case before us the defendant was a public officer. He admits by the demurrer the fraudulent conversion to his own use of money which he had in his possession and under his control by virtue of his office. The demurrer can not be sustained."

JULES LOWENTHAL v. THE STATE.

(32 Ala., 589.)

EMBEZZLEMENT.—The embezzle statutes provide punishment for every case of embezzlement of the property of another, which has come into the possession of a clerk or agent by virtue of his employment.

The fact that the property first came to the possession of the employer, and that the clerk or agent converting it is guilty of larceny at common law, does not take the case out of the statute.

The indictment was as follows:

The grand jury of said county charge, that before the finding of this indictment, Jules Lowenthal, being agent or clerk of Henry Sengstag (the said Jules not being an apprentice, or under the age of eighteen years) embezzled, or fraudulently converted to his own use, money to about the amount of $1800, which came into his possession by virtue of his employment, against the peace and dignity of the State of Alabama.

The state offered in evidence a certain bill of exchange dated New York, May 4th, 1857, purporting to be drawn by Samuel B. Matthews, in favor of Mad. Diaden on Rivers, Battle & Co., of Mobile, for $1800, payable on the first day of January next after date, which bill was shown to have been signed by Samuel B. Matthews. The court allowed it to go to the jury, to which allowance prisoner's counsel excepted.

The State introduced the book-keeper of Rivers, Battle & Co., who testified that the prisoner called at the office of Riv-

ers, Battle & Co., on the 24th day of December, 1857, and presented said bill of exchange to a member of the firm for acceptance. That the latter told him that as the bill had but a few days to run, they would cash it if the interest between that time and maturity were taken off; that the prisoner then left the office, but returned in a few minutes, and said, "we will do it," or "they will do it" (precise words witness could not remember); that Rivers, Battle & Co. thereupon gave prisoner their check for $\$1785\frac{61}{100}$. The prisoner wrote at the bottom of the bill, Rec'd payment, Sengstag & Co. Per J. Lowenthal—and then delivered said bill to Rivers, Battle & Co.

It was shown that said check had been paid, but not that prisoner had presented it or received the amount.

One Hye, a witness for the State, testified that he was the agent at Mobile for the firm of Sengstag & Co.; that prisoner was employed as a clerk of said firm, and his duty was to copy letters, deposit letters in the postoffice, and go on errands; that the bill came into possession of witness as agent for Sengstag & Co., and had been sent to them for collection. Witness handed the bill to the prisoner with instructions to present it to Rivers, Battle & Co. for acceptance, and then return it to witness. That when the prisoner was sent for the bill on the next day, he reported that both the Messrs. Battle were out of town, but they would accept the bill when they returned, and send it to Sengstag & Co. On the 26th day of December, the prisoner went to New Orleans without informing his employer of his intention to go. He was arrested and brought back.

Upon the trial the court instructed the jury, among other things, "that if they believed from the evidence that the prisoner was the clerk of Sengstag & Co., and received the bill of exchange from them or from their agent with instructions to present it to Rivers, Battle & Co. for acceptance, and then to return it, and that instead of doing so he fraudulently converted it to his own use, such conversion was an embezzlement under section 3143 of the code, although they should believe from the evidence that he had no authority to negotiate, discount, or in any way dispose of the bill, and this is so if they were satisfied that the bill had first come to the possession of his employer."

STONE, J. The indictment in this case strictly pursues the form given in the code, p. 702, form 36, and is sufficient.

The main question raised by the discussion in this case is, was the act of the prisoner for which he was indicted, larceny or embezzlement.

For the prisoner it was urged that he was not guilty of embezzlement, because the bill of exchange had been in possession of the employer before it came to the possession of the prisoner as his clerk, and under these circumstances the conclusion is claimed that if he subsequently disposed of it fraudulently *cum animo furandi*, and without authority, he is guilty of larceny. The English decisions upon their statutes come fully up to this doctrine; see them collected in 2 Bish. Crim. Law, 301, note 1, 2, 3 and 4. (*a*) This principle, if applied to our statutes, must work a reversal of this case. We think, however, that there is a substantial difference between the English statute and ours. Their first enactment was 21 Henry 8, ch. 7; it declared that when any casket, jewels, money, goods or chattles were delivered to a servant or servants by their master or mistress to keep, if any such servant or servants withdraw him or them from their said masters or mistresses, and go away with said caskets, etc., to the intent to steal the same, etc. It is obvious that this statute had but a restricted operation.

The statutes of 39 Geo. 3, c. 85, declared that if any servant or clerk, or any person employed for the purpose in the capacity of servant or clerk, to any person or persons whomsoever, or to any body corporate or politic, shall by virtue of such employment receive or take into his possession any money, goods, bonds, bills, notes, bankers' drafts, or other valuable securities or effects, *for or in the name or on account of his master or masters, employer or employers*, and shall fraudulently embezzle, secrete, or make away with the same, etc.

The later statutes, 7 and 8 Geo. 4, ch. 29, employs language of similar import to that which I have underscored above, its language is "receive or take into his possession," etc., "for or in the name or on the account of his master, and shall fraudulently embezzle the same," etc.

The words in the English statutes, copied above, for in the

(*a*) For the English Statutes, see pg. 3, ante.

name, or on account, of his master, show clearly the money, goods, etc., to come within the statute, must have been taken or received from some person other than the master and employer.

To say that a clerk received or took goods, etc., from his employer, *for or in the name or on account* of said employer, would be a palpable solecism. We think the English decisions upon their statutes are manifestly correct.

Our Statute Code, section 3143, contains no such clause as that referred to in the English statutes. Its language is "any officer, agent or clerk of any incoporated company, or clerk or agent of any private person or co-partnership, except apprentices and other persons under the age of eighteen years, who embezzles or fraudulently converts to his own use any property of another which has come into his possession by virtue of his employment, must on conviction be punished as if he had feloniously stolen such property."

The language of this section is much more comprehensive than either of the English statutes. It embraces and provides punishment for every case of embezzlement of property of another which has come into the possession of a clerk or agent *by virtue of his employment.*

The bill of exchange mentioned in the record was the *property* of *another*, and it went into the possession of the prisoner "by virtue of his employment," as clerk of Sengstag. The case is within the very letter of the statute.

The New York Statute, 2 Rev. Stat. 678, sec. 59, is substantially like ours, on the questions we have been considering, section 2, Bish. Crim. Law, sec. 302, note 2. We have no doubt that our legislation on this subject, although not verbally identical, was taken from the New York Statute. See Clay's Digest, 421, sec. 31; Code, sec. 3143. The New York Statute had been construed in that State before our penal Code was adopted. See *People* v. *Sherman*, 10 Wend., 298; People v. Dalton, 15 Wend., 581. With their decisions the views here expressed harmonize fully.

If it be objected that, under our construction, convictions for embezzlement may be had upon facts which constitute larceny at common law, we answer that conceding it to be so, we

know of no principle which denies to the legislature power to make such provision.

The City Court committed no error in the reception of evidence, and the charge was strictly in accord with the views above expressed.

Judgment of the City Court affirmed.

WARMOUTH v. COMMONWEALTH.

(Kentucky Law Rep. and Jour., vol. 4, p. 937. May, 1883.)

EMBEZZLEMENT.—A distinction exists where a servant has merely the custody, and where he has the possession of goods. In the former case the felonious appropriation of the goods is larceny; in the latter it is not larceny, but embezzlement.

A servant who receives money for or on behalf of his principal, and delivers it to such principal or another for him, or places it in some depository, such as a drawer or safe provided for that purpose, and afterwards fraudulently appropriates the same to his own use, is guilty of larceny, not embezzlement.

HARGIS, C. J. The appellant was indicted, tried and convicted of the offense of grand larceny, charged to have been committed by feloniously taking and carrying away $2647.57 in United States currency and bank notes, the property of the Adams Express Company, W. B. Dinsmore, and others.

He has appealed, and his counsel insist that the facts proven make out a case of embezzlement and not that of larceny, and that the court erred in its instructions to the jury. Upon first consideration, we were of the opinion that the crime alleged had been proven, but that is a fact which the jury have the exclusive right to determine under proper instructions;

consequently the only point necessary to be decided is whether the jury were rightly instructed, and not whether we believe the facts constituted grand larceny. The Adams Express Company, a joint stock company, employed Shain as its local agent at Badenburg. Shain furnished a room and safe in which to deposit the money and valuable articles consigned to the Company for transportation, and the appellant, as his clerk, by the consent of the Company, did the work and transacted the business of the Company for Shain, who gave a bond to the Company as its agent. The appellant was doing business generally for Shain, as his clerk, and among other things he was required to attend to receiving and receipting for money and goods delivered to the Express Company for transportion, for which Shain paid him.

The evidence tends to show that the custom of appellant was, when he received packages of money, or other articles for the Company, to deposit them in Shain's safe, and afterwards when the steamboat came along to deliver the money to the Company's agent on the boat; and that he received and receipted for the money charged to have been stolen, and applied it to his own use and ran off. The court instructed the jury in substance that if the appellant received or receipted for the money either as agent or as clerk of the agent of the Express Company, which was to transport it for hire, the money was legally in the possession of the Company, and if appellant took and carried it away with a felonious intent he was guilty of larceny.

Wharton and Bishop lay it down as a general rule that there can be no larceny without a trespass, and that the statutes of embezzlement were passed to make punishable acts of misappropriation where there was no trespass.

A distinction exists where a servant has merely the custody and where he has the possession of the goods.

In the former case the felonious appropriation of the goods is larceny; in the latter it is not larceny, but embezzlement.

The custody alluded to is such as that of a butler or house servant, of household goods, a hired hand of the plow and horses of the farmer, for whom he is laboring, etc., and the possession mentioned is an actual or constructive possession of

the master or employer at the time the goods are taken. What constitutes such a possession in a majority of cases requires some nicety of analysis to determine.

Generally, where the agent has received goods or money to carry, deliver, control or manage for the principal, unless the agent parts with the manual possession and delivers the property to the principal or another for him, or places it in some depository such as a drawer or safe provided for the purpose, and of which they have control, he cannot be convicted of larceny or felonious appropriation of the goods or money, the offense being embezzlement. Johnson v. Commonwealth, 5 Bush. 431. In the case before us, if the appellant, after he received and receipted for the money, deposited it in the safe provided by Shain, and then feloniously extracted the money from the safe and carried it off, his offense was grand larceny, for the possession of Shain was also the possession of the Company.

This view of the case was not embraced by the instructions, which should have been done, leaving the jury to determine whether the appellant, after he received the money, deposited it in the safe and afterwards extracted it from the safe with a felonious design to appropriate it to his own use. Wherefore the judgment is reversed and the cause remanded, with directions to grant appellant a new trial.

NOTE.—In Snapp v. Commonwealth, 6 Ky. Law Rep. and Jour., July, 1884, the defendant was employed by a city tax collector as clerk to collect taxes due the city, having collected taxes which he converted to his own use, he was indicted for larceny. *Held*, that he was not guilty of larceny since the money had come *rightfully* into his possession. That where one comes lawfully into possession of property, he does not become liable to a prosecution for larceny, for subsequently converting the same to his own use.

In McCann v. United States, 2 Wy., 267, the indictment charged the defendant with embezzling, stealing and purloining certain articles, without alleging the fact more particularly. It appeared on the trial, that the defendant had been employed by the Government to transport certain goods to a particular place, and that subseqnently a new arrangement was made with some other government agent concerning the transfer and delivery of the same goods, and that the defendant had appropriated the goods to his own use, etc. *Held* 1. That the defendant could show what the new arrange-

ment concerning the transfer and delivery was. 2. That the crime charged was embezzlement, not larceny. 3. That the indictment, not alleging the facts, charged a mere conclusion of law and was defective, although using the language of the statute, and 4. That a charge of embezzling and stealing by one and the same act is a charge of the commission of two distinct crimes and repugnant.

LARCENY.

Of the several definitions of larceny, given by writers on criminal law, Mr. East's seems to be the most favored. He defined larceny to be "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." (*a*)

In a recent English case, (*b*) in the Court of Criminal Appeal, BOLLIVER, C. J., in defining larceny said, "the proper definition of larceny, according to the law of England, from the time of Bracton downwards, has been considered to be "the wrongful or fraudulent taking and carrying away by any person, of the personal goods of another, from any place, without any color of right, with a felonious intent to convert them to the taker's own use, and make them his own property, without the consent and against the will of the owner."

However, since larceny may be committed by the finder of lost goods, or by one receiving from another a greater sum of money than was intended to be paid or delivered, without any previous wrongful or fraudulent intent up to the time of the actual finding or receiving; and since the taking and conver-

(*a*) 2 East. P. C., 553. (*b*) Reg. v. Middleton, Post 189.

sion will be complete if the thing stolen be abandoned by the thief, lost, cast away, destroyed or delivered to a third person, so as to deprive the owner of its temporary use, it is obvious that any words used to define the crime of larceny will be subject to many qualifications, and that no general rule of construction can give them application in every instance. (*c*)

STATE v. DAVIS.

(38 N. J., 176.)

LARCENY.—Fraudulently taking the personal property of another without his consent, and with no intent at the time of taking to return the same, is evidence of such intent to deprive the owner of his property, that a jury not only could, but should find the taker guilty of larceny.

To fraudulently take the personal property of another without his consent, and then to abandon the same so as to subject it to loss from the natural consequence of such abandonment, is a sufficient taking to sustain a conviction for larceny, though the property was not actually lost.

The defendant, in passing along the street near midnight, took a horse and carriage which was standing in front of a residence, and drove rapidly away. About ten o'clock the next day the horse and carriage were found abandoned. *Held*, that this was sufficient evidence of the felonious intent to deprive the owner of the property to constitute the crime of larceny.

SCUDDER, J. The defendant, who is quite young, in passing along the street, near midnight, February 22, 1875, saw the carriage of Dr. Charles Hodge, Jr., standing in front of his residence. He and a companion took the horse and carriage, drove rapidly away in a reckless manner, and about ten o'clock the next day the horse and carriage were found abandoned sev-

(*c*) Reg. v. Middleton, Post 189; State v. Davis, Post 146; Waters v. People, Post 153; Com. v. Titus, Post ; People v. Swan, Post ; Baker v. State, Post 179; Loomis v. People, Post 171; Murphy v. People, Post 157; Welsh v. People, Post ; R. v. Lavender, Post 181; R. v. Paradice, Post 182.

eral miles away from where they were taken. They were found in the road, the horse much exhausted from driving and want of food. The prisoner did not return the horse and wagon to the owner, or make any effort to do so, or apprise any one where they could be found, or to whom and where they belonged. He did not even put them in some secure place, where the owner might find them. These acts were perfectly consistent with an intent originally to deprive the owner of his property; but finding them a dangerous possession, and becoming frightened, they were abandoned when detection became imminent. His conduct was utterly reckless of the rights of the owner; but was it criminal, and does it sustain the finding that he was guilty of larceny?

The principles which much determine this case are fully discussed by Chief Justice Green, in State v. South, 4 Dutch., 28, and, as is his wont, he leaves but little to find on the subject for those who come after him as gleaners.

The question in the case was, whether the fraudulently depriving the owner of the temporary use of a chattel can constitute larceny at the common law; whether the felonious intent, or *animus furandi*, may consist with an intent to return the chattel to the owner. It was there held, that if the property was taken with the intention of only using it temporarily, and then returning it to the owner, it is not larceny; but if it appears that the goods were taken with the intention of permanently depriving the owner of his property, then it is larceny, and that this intent is a fact to be decided by the jury from the evidence.

The question, therefore, in this case is whether there are facts shown from which a jury should infer that it was the intention of the defendant to permanently deprive the owner of his property.

A man's intention must be judged by his acts and expressions; and it is manifested by circumstances that vary with almost every case that is presented for consideration. The general rule to determine what he intends by his acts is, that a man intends the consequence which he contemplates, and which he expects to result from his acts, and he therefore must be taken to intend every consequence which is the natural and

immediate result of any act which he voluntarily does. 2 Stark. Ev., 573.

When by the voluntary act of this defendant, the horse and carriage were loosed from their hitching place in front of their owner's door, and driven away in the night, and after many miles and hours of reckless driving, were left in the public road, did the taker contemplate, and was the natural and immediate consequence which he should be presumed to contemplate at the time of taking, that the owner would be permanently deprived of his property?

It is not his intention at the time of the abandonment, but the purpose at the time of the taking that we must seek; for an article may be taken with intent to steal, and afterwards abandoned on pursuit, or from a mere change of purpose, yet the taking will be larceny. I think the fraudulent taking the personal property of another without his consent, and with no intent at the time of taking to return the same, is evidence of such intent to deprive the owner of his property; that a jury not only could, but should find the taker guilty of larceny.

It is not a mere temporary taking which may consist with an intent to return, but a taking which may result by a natural and immediate consequence in the entire loss and deprivation of the property to the owner. An abandonment to mere chance is such reckless exposure to loss, that the guilty party should be held criminally responsible for an intent to lose.

If a person takes another's watch from his table with no intent to return it, but for the purpose of timing his walk to the station to catch a train, and when he reaches there, leaves it on the seat, for the owner to get it back or lose it, as may happen; if a man takes another's axe with no intent to return it, but to take it to the woods to cut trees, and after he has finished his work cast it into the bushes, at the owner's risk of losing it, such reckless conduct would be accounted criminal. It is true that the probability of finding the horse and wagon may be greater than that of recovering the watch or axe, because they are larger and more difficult to conceal, but the intent is not to be measured by such nice probabilities, rather by the broader probability that the owner may lose his prop-

erty, because the taker has no purpose of ever returning it to him.

The cases that are most frequently cited in opposition to this view are, Philips & Strong's Case, 2 East P. C., ch. 16, § 98. Here the horses were taken to and in a journey, and left at an inn. The jury found the prisoner guilty, but added they were of opinion that the persons meant merely to ride them to Leedsdale and leave them there, and that they had no intention to return them or to make any further use of them. The court said, that if the jury had found the prisoner guilty generally upon the evidence, the verdict could not have been questioned, but as they found specially from the facts that there was no intention in the prisoners to change the property, or make it their own, but only to use it for a special purpose to save their labor in traveling, it was only a trespass and not a felony. The express intention found was inconsistent with the general finding. Yet the facts were sufficient to sustain a general verdict of guilty of larceny. The court were divided on the effect of this special finding.

In Rex v. Crump, 1 C. & P., 658, (11 E. C. L.), the prisoner took a horse with other property, and after going some distance turned the horse loose, proceeded on foot and attempted to dispose of the other property. It was left to the jury to say whether he intended to steal the horse or to use him to carry off the plunder. He was found not guilty of stealing the horse, and guilty of stealing the other property.

It was said that he distinctly manifested his purpose of converting the other articles to his own use by offering them for sale. It is odd that such a nice distinction and division of intention should be made dependent on the kind of property taken at the same time.

Lord DENMAN said in Regina v. Holloway, if a man took another's horse without leave, intending to ride it at every fair in England (which would take him a year), and then return the horse at the end of that time, it would not be larceny. This was the statement of an extreme case by way of illustrating a principle, and there was here a purpose to return to the owner.

In Rex v. Cabbage, R. & R. C. C., 292, the prisoner went to

a stable door, forced it open, took the horse out, went some distance along the road until he came to a coal pit, and then backed the horse in the pit, where he was found dead. It was held that it was not essential, to constitute the offense of larceny, that the taking should be *lucri causa;* that taking fraudulently, with an intent wholly to deprive the owner of the property, was sufficient, and the prisoner was convicted.

These cases will be sufficient to illustrate the principles and distinctions upon which this case will be decided.

It is conceded that the law is settled with us according to the rule of the common law, and the approved definition of larceny, given by Mr. East in East's P. C., ch. 16, § 1, where it is said to be "the wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." And it has been uniformly held that the felonious intent must manifest a purpose to deprive the owner wholly of his property.

The definition given by EYRE, B., Pear's Case, P. C., ch. 16, § 12, that larceny is the wrongful taking of goods with intent to spoil the owner of them *causa lucri*, would seem to be too narrow, because the law considers not only and always the effect of gain to the taker, as an essential to the crime, but also the deprivation to the owner of his property. Either will be sufficient in the evidence of larceny. 2 Arch. Cr. Pr. & Pl., 389–392.

It is interesting, however, to notice the broader definition of theft or larceny in the civil law, and how nearly it accords with the efforts to reach, by criminal punishment, the reckless temporary use and abuse of the property of others, by taking from an owner who does not consent.

Just. Ins., lib. 4, *tit.* 1. thus defines it: *Furtum est contrectatio fraudulosa, lucri faciendi gratia, vel ipsius rei, vel etiam usus ejus, possessionisve; quod legi naturali prohibitum est admittere.*" Thus, not only the fraudulent taking of the thing itself, but the using and possessing anything by fraud for the sake of gain, was theft by the civil law. But this does not agree with the law as settled in our common law courts, and

the taker must intend to deprive the owner wholly of his property.

This is the conclusion to which Chief Justice GREEN came, as it appears reluctantly, in the case of The State v. South, and against whom Judge SHARSWOOD protests in the note to *Queen v. Holloway*, 1 Den. C. C., 376, reasoning strongly for an extension of the definition of larceny.

Doubtless the severe punishment of felony under the old English law has led to this more restricted construction, but the lighter penalties which now are inflicted would seem to make an extension of the crime of theft or larceny desirable, even to the limits of the civil law definition.

There has been no case decided in this State that has held that where the taker had no intention to return the goods, the taking was merely temporary. Nor is there anything that should control the action of a jury, or the court acting as such, under the statutes, when they find that the party having no such intent is guilty of larceny. It would be most dangerous doctrine to hold that a mere stranger may thus use and abuse the property of another, and leave him the bare chance of recovering it by careful pursuit and search, without any criminal responsibility in the taker.

The court of quarter sessions are advised that the verdict is right, and should not be disturbed.

NOTE.—In Hill and another v. The State, 57 Wis. 377, the information was for larceny of a horse, the property of one Barber, the keeper of a livery stable, in the city of Waukesha. The defendant, LAWRENCE, on the 10th day of September, at five o'clock in the afternoon, hired the horse, with a top buggy, to go to a place called Honeyaker, about three miles from Waukesha, to be returned at nine or ten o'clock that evening. The defendant, *Hill*, was taken into the buggy before leaving Waukesha, and a short distance from that place on the road to the city of Milwaukee, the buggy was turned over and the top torn off and left, and they drove on together to Milwaukee that night. The next day *Hill* was at Oak Creek, in Milwaukee county, on the road to Racine, with the horse and a part of the harness, and tried to sell the horse there, and was arrested, and *Lawrence* was arrested in Milwaukee. They both prevaricated as to their names, residences, and destination.

Upon the trial, the Municipal Court of the county of Milwaukee refused the following instruction asked on behalf of the defendants. "It

the defendants, at the time said horse was hired, had no intent to steal it, the subsequent appropriation of the same to their own use, is a mere conversion, and is not larceny." And the court gave the following instruction, which was excepted to on behalf of the defendants: "If you believe their statements against Barber's and his man's, that was in the stable at the time, that they hired the horse for an indefinite purpose and agreed to be back before ten o'clock at night, and that they afterwards went to Milwaukee, *and formed a design to sell the horse after that time, at any time before they were caught, you will be justified in finding they had that intent at the time they took the horse.*"

Orton, J., in reversing the judgment of conviction, among other things said: "The instruction refused, substantially expressed the law, and ought to have been given, and the instruction given was clearly erroneous, because against the law so expressed. It may at one time have been considered the law of larceny that although the hiring and taking, in the first place, might have been *bona fide*, yet if the time for which the hiring was made had expired, and the property is afterwards converted, it is larceny. But such has not, for a long time, been considered the law, and it is now stated correctly as follows: That "where the horse was delivered on a hire or loan, and such delivery was obtained *bona fide*, no subsequent wrongful conversion, pending the contract, would amount to a felony." 2 Rush. on Crime (9th ed.), 237. "When the possession was obtained *bona fide*, the mere fact of the subsequent existence of the *animus furandi* does not make the offence larceny." 2 Whart. Crim. Law § 1869. The exceptions to this rule has no application to this case. "If one hire a horse and sell it before the journey is performed, *or sell it after, or before* it is *returned*, he commits no larceny, in a case where the felonious intent came upon him subsequent to the receiving it into his possession." 2. Bish. Crim. Law, § 864.

Those statements of law should be qualified by saying if he hires the horse in the first place with a *bona fide* intent of returning it according to the contract of hire, the circumstances of the conversion of the property subsequent, and of not even entering upon the performances of the contract of hire, but taking the property elsewhere, and of other matters evincing it, may be evidence of an intention to convert the property at the time of the hiring.

But a subsequent conversion of the property merely may not be sufficient evidence of such an original intent."

Sterling F. Waters v. The People of the State of Illinois.

(104 Ill., 554.)

Larceny.—1. Duplicity in count of indictment. Where a person by one united, continuous and indivisible act, steals a horse, buggy and harness, a count in an indictment for larceny of the horse, buggy and harness is not obnoxious to the charge of duplicity. Such act constitutes only one crime, and all the articles stolen are property named in the same count. If the different articles had been stolen at different times, it would present a different question.

2. To constitute duplicity in an indictment there must be joined in the same count different, separate and distinct crimes, committed at different times. When it is but one act, fully completed at the same time, there can be no duplicity, however many different kind of articles of property are alleged to be stolen, and, it being but a single larceny, it is not error to so charge in one count in the indictment.

3. Larceny—presumed from possession. The possession of property, recently stolen, is evidence upon which a jury may convict the person having such possession, unless he show the possession was honest and lawful. When such possession is shown, it devolves on the accused to rebut the presumption of guilt thus raised, by showing his possession to be innocent and rightful.

Writ of error to the Circuit Court of Will county, the Hon. Josiah McRoberts, Judge, presiding.

Messrs. Haley & O'Donnell, for the plaintiff in error.

A verdict of guilty as charged in a count of an indictment, means guilty of the larceny of all the property described in such count. 2 Archbold's Criminal Pr. and Pl., 373 and note.

If defendant was not guilty of the larceny of the horse, then this verdict is unsupported, without regard to the balance of the goods. Even though guilty of outrageous conduct in obtaining possession of the horse,—even though guilty of a malicious trespass in removing and turning it loose,—still, unless the evidence shows larceny beyond all reasonable doubt, the conviction can not stand. Stuart v. People, 73 Ill., 20; Phelps v. People, 55 id., 334; McConrt v. People, 64 N. Y., 583; Phillips v. Strong, Case, 2 East, P. C. 662; Smith v. Schultz, 1 Scam., 490; Smith v. Donnelly, 66 Ill., 464; Rex v. Crump, 1 Carr, v. Paine, 656.

The instruction in respect to the possession of stolen property, stating it to be sufficient evidence of guilt unless defendant's possession is satisfactorily explained by the evidence, is erroneous. The evidence need only rebut the presumption to such an extent as to raise a reasonable doubt of defendant's guilt. The defendant is not required to establish his innocence to the satisfaction of the jury, when once a prima facia case is made out against him. Comfort v. People, 54 Ill., 404; Hopps v. People, 31 id., 385; Chase v. People, 40 id., 350.

The punishment for the larceny of a horse is different from that of a buggy and harness, and being so, a count charging both offences is bad for duplicity. Barton v. State, 18 Ohio, 221; Commonwealth v. Symonds, 2 Mass., 162; Reed v. People, 1 Parker's Cr. R., 481; 1 Archbold's Criminal Pl., 49, 55, 56.

Mr. James McCartney, Attorney General, for the People:

It is not necessary to prove the larceny of all the articles alleged to have been stolen. Archbold's Criminal Pl., (7th ed.) 161; 3 Chitty's Criminal Law, 946.

The exclusive possession of the whole, or some part of property recently after the theft, is sufficient, when standing alone, to cast upon the party having such possession the burden of explaining how he came by it. 2 Russell on Crime, 337; Phillips on Evidence, (7th ed.), 168; Knickerbocker v. People, 43 N. Y., 177; State v. Braddy, 27 Iowa, 126; State v. Creson, 38 Mo., 372; State v. Turner, 65 N. C., 592; State v. Williams, 9 Ired., 140.

Two distinct crimes may be joined in one count, where one

and the same act constitutes both crimes. Ruth v. People, 99 Ill., 185; 1 Wharton's Criminal Law, sec. 931; Oleson v. State, 20 Wis., 58.

A count in an indictment charging that the defendant broke and entered a shop with intent to commit a larceny, and did then and there commit a larceny, is not bad for duplicity. Commonwealth v. Tuck, 20 Pick., 356; Commonwealth v. Hope, 22 id., 1; State v. Ayer, 23 N. H., 301; Davis v. State, 3 Coldw., (Tenn.), 77.

The Supreme Court of Vermont has passed upon a case identical with the one at bar, and there held that a single count in an indictment charging the larceny of a horse, wagon and harness, was not bad for duplicity. State v. Cameron, 40 Vt., 555.

This court has before sustained a count charging the larceny of horses and harness, and no reason appears for overruling the decision. Bennett et al. v. People, 96 Ill., 602.

Mr. Justice WALKER delivered the opinion of the court. Plaintiff in error was indicted in the Will Circuit Court for larceny. The first count charges him with the larceny of one horse, the property of one Barnes. The second count charges him with the larceny of one horse, one buggy and one harness, the property of the same person. On a trial, the jury found plaintiff in error guilty as charged in the second count in the indictment, and fixed his term in the penitentiary at four years. It is urged that the indictment is bad, and the court erred in overruling a motion to quash. Also, that the evidence fails to support the verdict, and the instructions for the People are erroneous. For this reason a reversal is asked.

It is urged that the second count is double, as it charges the stealing of a horse, and a buggy and harness; that horse stealing constitutes a distinct offence, and the stealing of a buggy or a harness, another and different offence; that the punishment for horse stealing is confinement in the penitentiary not less than three nor more than twenty years, while the punishment for grand larceny of other property is fixed at not less than one year nor more than ten years. It is therefore claimed that the stealing of a horse is, under the statute, a different and distinct crime from the stealing of a buggy or harness; that they

are separate offences, created by different sections of the statute, which imposes different degrees of punishment, and for that reason the count charges two separate and distinct crimes, and is bad because of duplicity, and the judgment should have been arrested. In this case there were not two crimes. It was one united, continuous and indivisible act, consisting of the larceny of one horse, one buggy and one harness. It would be unheard of to permit the people to split up such a larceny into two or more separate crimes, and to allow as many different and separate convictions. To be duplicity there must be joined in the same count different, separate and distinct crimes, committed at different times. When it is but one act, fully completed at the same time, there can be no duplicity, however many or different kinds or articles of property are stolen, and it being but a single larceny, it is not error to so charge it in one count in the indictment. Had the horse been stolen at one time, and the buggy and harness at another, then there would be force in the argument, because there would have been two separate and complete crimes. But by no process of reasoning can there be held to be more than one crime in this case. The jury heard the evidence, and it was for them to determine whether the accused took the property, and if so, what was his purpose in taking it,—whether with an honest or felonious intent. They have found it was with a felonious purpose, and we are satisfied the evidence required the finding of their verdict. Because the owner found the horse a few hours after he was taken, not far distant from the place from which he was taken, does not necessarily rebut the presumption raised by the circumstances in evidence that it was stolen. On the contrary, from the evidence there is scarcely a doubt that plaintiff in error, almost immediately after stealing Barnes' horse, took another horse from a buggy, turned Barnes' loose, and hitched the other horse to Barnes' buggy. From this fact the jury could not reasonably find otherwise than he took Barnes' horse with a felonious intent.

The possession of property recently stolen is evidence upon which a jury may convict the person having such possession, unless he shows the possession was honest and lawful. When such possession is shown, it devolves on the accused to rebut

the presumption of guilt thus raised, by explaining and showing his possession to be innocent and rightful. The abandonment of Barnes' horse, under the circumstances, does not repel the presumption that he took the horse, or that the taking was felonious. He was seen in possession of the property almost immediately after the taking, which was evidence of the larceny, and he offered no evidence to rebut this presumption of his guilt. In view of the entire evidence, the jury were warranted in finding the verdict they did.

Complaint is make that the court erred in refusing instructions asked by accused. The instruction asked and given for him embraced all of the correct legal propositions contained in the refused instruction. Nor, in view of all of the instructions given, are we able to see that the jury could have been misled. They were fair, and stated the law correctly, and this being so, there is no ground for a reversal, and the judgment of the court below must be affirmed.

Judgment affirmed.

MICHAEL MURPHY v. THE PEOPLE.

(104 Ill., 528.)

LARCENY.—If the owner of goods alleged to have been stolen, parts with both the possession and the title to the goods to the alleged thief, then neither the taking nor the conversion is felonious. It can but amount to a fraud.

If, however, the owner parts with the possession voluntarily, but does not part with the title, expecting and intending that the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon, for his benefit, then the goods may be feloniously converted by the bailee, so to relate back and make the taking and conversion a larceny.

The facts as shown by the prosecution, were, that one C. entered a place of business kept by one F., to make a purchase, and procured the articles

desired. The buyer, not having the exact amount of money with which to pay for the articles purchased, handed the proprietor a twenty dollar gold coin for the purpose of making "change." The proprietor, on looking over his money on hand, said he could not "change" it, and thereupon pushed the coin towards the accused, who was standing near, and requested him to go and get the coin "changed." The accused took the coin, left the room, and never returned or accounted for the coin. It was *held*, these facts made a case under the indictment.

VARIANCE.—It was charged that the coin was delivered to the accused by C., the buyer, while the proof shows it was delivered by F., the proprietor, to whom it had been handed by C., for the purpose of making "change," it was *held*, that as to the delivery, F., the proprietor, was to be regarded as the agent of C., and that there was no variance.

JOINDER OF COUNTS.—A count for larceny, and a count for embezzlement, may be joined in the same indictment, and be good, a general verdict of guilty will be sustained.

NEW TRIAL.—Evidence considered insufficient to warrant a new trial.

Counsel assigned by the court will be presumed to be competent, and the question of the competency of such counsel will not be considered on a motion for a new trial.

Writ of error to the Circuit Court of Will County, the Hon. J. McRoberts, Judge, presiding.

Messrs. Haley & O'Donnell, and Mr. J. R. Flanders, for the plaintiff in error.

James McCartney, Attorney General, for the People.

Mr. Justice Schofield delivered the opinion of the Court.

Plaintiff in error, and John Fay, were jointly indicted for the crime of larceny. They were jointly tried, and the jury found plaintiff in error guilty, and Fay not guilty. Judgment was entered upon this verdict, after overruling a motion for a new trial. This writ is prosecuted to reverse that judgment, for several errors alleged, which we shall proceed to briefly consider.

First—It is claimed the verdict is not sustained by the evidence. The undisputed facts, as proved on the trial, are: One Coskey, and a friend accompanying him, entered a saloon, in Joliet, kept by Fay, and procured drinks, and Coskey not having the exact amount of money with which to pay for the drinks, handed Fay a twenty dollar gold coin, United States

coinage, for the purpose of making "change." Fay, on looking over his money on hand, said he could not "change" it, and thereupon pushed the coin toward plaintiff in error, who was, at the time, standing by the bar, and requested him to go and get it "changed." Plaintiff in error took the coin, left the saloon, and never returned or accounted for the coin.

The case seems in all its essential features, precisely like Farrell v. The People, 16 Ill., 506. There, one Hennis, gave Farrell, who was a hack-driver, a five dollar bill to be "changed," in order that Hennis might pay Farrell twenty-five cents. Farrell did not return with the bill or the "change." The court held he was guilty of larceny.

In Walsh et al. v. The People, 17 Ill., 339, (a case similar in the controlling principle to that in the present case), it was said: "Where, as in this case, the alleged larceny is perpetrated by obtaining the possession of the goods by the voluntary act of the owner, under the influence of false pretenses and fraud, when the cases are carefully examined and well understood, there is no real difficulty in deducing the correct rule, by which to determine whether the act was a larceny and felonious, or a mere cheat and swindle. The rule is plainly this: if the owner of the goods alleged to have been stolen, part with both the possession and title to the goods to the alleged thief, then neither the taking nor the conversion is felonious. It can but amount to a fraud. It is obtaining goods under false pretenses. If, however, the owner parts with the possession voluntarily, but does not part with the title, expecting and intending that the same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon, for his benefit, then the goods may be feloniously converted by the bailee, so as to relate back and make the taking and conversion a larceny. The pointed inquiry in such a case must always arise, did the owner part with the title to the things, and was the legal title vested in the prisoner."

Again, in Stinson v. The People, 43 Ill., 397, the same doctrine was reiterated. It was there among other things said: "If, however, the owner parts with the possession voluntarily, but does not part with the title, expecting and intending the

same thing shall be returned to him, or that it shall be disposed of on his account, or in a particular way, as directed or agreed upon, for his benefit, then the goods may be feloniously converted by the bailee, so as to relate back and make the taking and conversion a felony, if the goods were obtained with that intent.

This settles the law in this State, but analogous ruling, elsewhere, may be found in the following cases, referred to in argument by the Attorney General: Bailey v. The State, 58 Ala., 414; Commonwealth v. Barry, 124 Mass., 325; State v. Williamson, 1 Houst. Crim. C., 155; State v. Anderson, 25 Minn., 66; People v. Abbott, 53 Cal., 284; Elliott v. Commonwealth, 12 Bush., 176; Macino v. People, 19 N. Y., 127; Commonwealth v. Hurd, 123 Mass., 438; People v. McDonald, 43 N. Y., 61; Hildebrand v. People, 56 Id., 394.

No mitigating or extenuating circumstances were given in evidence, and no grounds are therefore apparent upon which it can be said the verdict is not sustained by the evidence. The proof on behalf of the prosecution made a case, and that proof is in no manner overcome or impaired by controverting proof on behalf of plaintiff in error.

Second—It is argued the second count in the indictment is for embezzlement, and it is bad. Suppose it is, the first count is undoubtedly good, and that is sufficient to sustain the general verdict of guilty. Townsend v. The People, 3 Scam., 329; Holliday v. The People, 4 Gill., 113. But if the counts be both good, and we think they are, inasmuch as it is evidently but the statement of the same felony in different forms, the joinder is not objectionable. Lyons et al. v. The People, 68 Ill., 275. Joinder of embezzlement with larceny is in accordance with the well established practice. 1 Wharton's Criminal Law, (7th ed.) latter part of Sec. 420, and cases referred to in note V.

And it may also be properly here added, the objection that there is a variance between the proof and the second count, (if it were important to consider such a question when it does not also lie to the first count,) is untenable. The averment that the delivery was to plaintiff in error, is literally sustained. As to that act, Fay is to be regarded as the agent of Coskey, and

the rule applicable is, what the principal does by an agent he does by himself.

Third—Counsel for plaintiff in error contend the property here was not properly laid in the indictment as the property of Coskey. We can not yield our assent to this view of the law. In all the cases before referred to on the question of the character of the offence made out by the unquestioned facts, a contrary doctrine is announced. The property may be alleged in the indictment as the property of the real owner, or of any person having a special property in it as bailee. 2 Russell on Crime, (7th Am. ed.), 89, *90; 2 Wharton's Criminal Law, (7th ed.), Sec. 1818, et seq. But clearly no title here passed to plaintiff in error. There was no intention he should become owner. He was simply to perform a duty in regard to the property,—"change" it—that is, convey it to one who would give what, in popular language, is denominated "change," viz: bills, or gold or silver coins, or some of each, of lesser denominations, in amount of equal value, in exchange for it, and return this "change" to Coskey. Fishback v. Brown, 16 Ill., 74, cited and relied upon by counsel for appellant, does not affect the question. In that case, what was decided was simply that a party "changing" money for an agent, supposing him to be acting as principal, may proceed against either the agent or the principal, when he discovers him, in the event of a right of action growing out of such "changing" of money. The agent was there held liable because the principal was not known and trusted, but there would not have been the slightest objection, had the party so elected, to holding the real principal liable.

It may be, had this coin been alleged to have been the property of Fay, plaintiff in error could not have objected to his title, but this furnishes no objection to the property being alleged in the real owner. In point of fact, no title ever passed to Fay. It was passed to him just as he passed it to plaintiff in error—not to invest title, but to procure it to be "changed" into, or to speak more accurately, exchanged for, bills or coins, or a combination of each, of smaller denominations, in an aggregate amount and value equal to it, and as to that act he was, legally, the agent of Coskey.

We can not perceive that Kribs v. The People, 81 Ill., 599, has any bearing upon the case. There the indictment was for larceny only, as at common law, while here we have a count for larceny as at common law, and a count for embezzlement, and hence, if the proof sustains either, the conviction must stand. But from the authorities cited, and what has been said, it must be evident, we are of opinion, the evidence sustains the count for larceny as at common law.

The affidavits in support of the motion for a new trial discloses no sufficient ground. Two of them merely show efforts of the plaintiff in error to get money "changed," —what money, is not conclusively shown. But even if it were this for the stealing of which he is convicted, that fact does not even tend to show his innocence. His offence is not in failing to get the money "changed," but in failing to return it, and in appropriating it to his own use. Doubtless his own convenience required that it be "changed." The only other affidavit is that of plaintiff in error, that he was intoxicated, and, by reason thereof, oblivious of all he did in regard to this money. Waiving comment upon some inconsistencies and improbabilities in this affidavit, we deem it sufficient to say the court below assigned plaintiff in error counsel for his defence who, we must presume, was fully competent to the duty assigned him. Neither plaintiff in error nor that counsel deemed it advisable to introduce plaintiff in error, or any other witness, to make that proof upon the trial, nor was a continuance asked to obtain evidence in that regard. We can not permit the competency of counsel to defend persons charged with crime to be thus introduced as in issue on motion for a new trial.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

NOTE.—In Justices, etc. v. People ex rel., Henderson, 90 N. Y., 13, the relator, a saloon keeper, received a twenty dollar gold coin from a customer, to be changed for twenty-five cents due the relator, from the customer, relator not having sufficient change in his place of business, at the request of the customer, took the coin and stepped out to obtain change elsewhere, and did not return, but lost the twenty dollars gamb-

ling. Upon these facts the Court of Appeals *held*, that a conviction for larceny was right.

In Hildebrand v. People, 56 N. Y., 394, the prosecutor handed the prisoner, who was a bar-tender in a saloon, a fifty dollar bill to take ten cents out of it, in payment of a glass of soda. The prisoner put down a few coppers on the counter, and when asked for the change, he took the prosecutor by the neck and shoved him out doors and kept the money.

Upon these facts the defendant was convicted of larceny.

For the prisoner it was insisted that the facts did not warrant the conviction.

In sustaining the conviction, Church, C. J., said:

"When the possession and property are delivered voluntarily, without fraud or artifice to induce it, the *animus furandi* will not make it larceny, because in such a case there can be no trespass, and there can be no larceny without trespass. 43 N. Y., 61. But in this case I do not think the prosecutor should be deemed to have parted either with the possession of or property in, the bill. It was an incomplete transaction to be consummated in the presence and under the personal control of the prosecutor. There was no trust or confidence reposed in the prisoner, and none intended to be. The delivery of the bill, and the giving change, were to be simultaneous acts, and until the latter was paid, the delivery was not complete. The prosecutor laid his bill upon the counter, and impliedly told the prisoner that he could have it upon delivery to him of $49.90. Until this was done, neither possession nor property passed; and in the meantime, the bill remained in legal contemplation under the control and in the possession of the prosecutor."

REG. v. ELIZABETH BIRD.

(12 Cox's Criminal Cases, 257.)

LARCENY.—The indictment charges the stealing of "nineteen shillings in money," of the money of Maria Lovell. It was proved that Maria Lovell got into a merry-go-round at a fair, and handed the prisoner a sovereign in payment for the ride, asking her to return the change. The prisoner thereupon handed to said Maria Lovell 11d., and said that she would give her the rest of the change when the ride was finished, as the "merry-go-round" was then about to start. After the ride was over, the prisoner said Maria Lovell had only given her 1s. for which she had given the proper

change, and declined to give any more. *Held*, that the prisoner could not be convicted for stealing the 19s., for she had not taken them from the prosecutrix.

Case reserved for the opinion of this court at the General Court of Quarter Session for the county of Buckingham, holden at Aylesbury, in the said county, on the 15th of October, 1872.

Elizabeth Bird was tried upon an indictment, which charged that she, the said Elizabeth Bird, "on the 12th of October, 1872, 19s. in money, of the money of Maria Lovell, feloniously did steal, take, and carry away against the peace of our Lady the Queen, her crowned and dignity."

It was proved that the said Elizabeth Bird was the daughter of a man who traveled about to fairs with a shooting gallery, and a merry-go-round, or revolving velocipede machine, for riding, on which he made a charge of 1d. to each person for each ride.

On the day in question, the said Maria Lovell got into the "merry-go-round," which was then in charge of Elizabeth Bird, and handed to the said Elizabeth Bird a sovereign in payment for the ride, asking her to give her the change. The said Elizabeth Bird thereupon handed to the said Maria Lovell 11d., and said that she would give her the rest of the change when the ride was finished, as the merry-go-round was then about to start. The said Maria Lovell assented to this, and about ten minutes after, when the ride was over, she found the said Elizabeth Bird attending to the shooting gallery, and asked her for her change, to which the said Elizabeth Bird replied that she had only received from her 1s., for which she had given the proper change, and she declined to give any more.

Upon these facts, it was contended by the counsel for the prisoner, first, that the prisoner could not be convicted of stealing the 19s., because no specified 19s. had ever been appropriated as the change for the sovereign handed to the prisoner, nor had there been a taking, either actual or constructive, of the 19s. from the said Maria Lovell; secondly, that under the above form of indictment, the prisoner could not be convicted of stealing the sovereign; and that even if the indictment was sufficient, there was no evidence of a felonious taking

of the sovereign, as it was not taken from Maria Lovell; and further, that the prisoner could not be convicted of larceny of the sovereign, as a bailee, because, assuming that there was any evidence of a bailment, which was denied, the bailment was not to re-deliver the same money which was delivered to the prisoner.

I overruled the objections, and directed the jury that if they were satisfied that the said Maria Lovell gave the prisoner the sovereign, and that she knew it, and wilfully refused to give the said Maria Lovell the remainder of the change, they might properly convict the prisoner of stealing the 19s.

The jury having returned a verdict of guilty, I reserved the above points for the consideration of the Court for the consideration of Crown Cases Reserved, and judgment was in the meantime postponed and the prisoner admitted to bail.

The question for the opinion of the Court is, whether under the circumstances above stated, the prisoner was properly convicted on the above indictment.

Dated this eleventh day of November, 1872.

[Signed.] Buckingham and Chandos,
Chairmen of the above Court of Quarter Sessions.

The case was first argued in the Court for the Consideration of Crown Cases reserved, before Kelly, C. B., Martin, B., and Brett, Grove, and Quain, J. J., who directed it to be argued before all the judges.

Graham, for the prisoner. The conviction cannot be supported. First, there was no larceny of the sovereign, because the prisoner was not bound to return it to the prosecutrix. To make the prisoner a fraudulent bailee, she must have been bound to return the sovereign in specie. Ry v. Garrett, 2 Fos. & Fin., 14; Reg. v. Hoare, 1 Fos. & Fin., 647.

[Blackburn, J. May the prisoner not have been a bailee of the sovereign subject to her right of lien on it for 1s?] Not here, as the sovereign was handed to the prisoner with the intention that it should become her property, and credit was given to her for the change. [Cockburn, C. J. Was there any intention to part with the sovereign?] It is submitted that

there was. Rex. v. Thomas, 9 Car. & P., 741; Rex v. Harvey, 1 Leach C. C., 467; Perke's case, 2 East P. C., 671; Reg. v. Oliver, Bell C. C., 287; 8 Cox C. C., 384; Reg. v. Prince, 11 145; L. Rep. C. C. R., 150; Walsh's case, Russ. & Ry., 215; Reg. v. Reynolds, 2 C. C., 170; Rex. v. Nicholson, 2 Leach C. C., 610. If the prosecutrix intends to part with the property, the mere fact that the possession was obtained by a fraud does not make the offence larceny. Rex. v. Jackson, 1 Mood. C. C., 119; Rex. v. Atkinson, 2 East P. C., Cap. 16, Sec. 104; Reg. v. North, 8 Cox C. C., 433; Reg. v. Williams, 7 Cox C. C., 355; Reg. v. M'Kale, 37 L. J. 97, M. C.; 11 Cox C. C., 32. [COCKBURN, C. J. Suppose the prosecutrix never intended to part with the property in the sovereign until she got the 19s changed? Mellor, J. Was there a voluntary parting with her entire interest in the sovereign? BLACKBURN, J. The prosecutrix never thought of giving the prisoner credit for the 19s. [KELLY, C. B. The real question is, was this but one transaction, a few minutes elapsing while the machine was going round is immaterial.] It is contended that the property in the sovereign was parted with, and that the prosecutrix could not have maintained an action to recover it, as she never intended to have that sovereign returned to her. Secondly, the conviction for stealing 19s., as alleged in this indictment, cannot be sustained. Before the 14 and 15 Vict. c. 100, s. 18, it was necessary to allege in the case of money stolen the specific coins, and it was customary to charge the stealing of so many pieces of the current coin of the realm called sovereigns, shillings, etc., as the case might be, and it was necessary to prove that some one of the specific coins alleged was stolen. To remove difficulties that had arisen on this state of the law, sec. 18 enacts that "in every indictment in which it shall be necessary to make any averment as to any money, etc., it shall be sufficient to describe such money, etc., simply as money, without alleging so far as regards the description of the property, specifying any particular coin, and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, although the particular species of coin of which such amount was composed shall not be proved. Now, under the allegation of stealing 19s. in this indictment, the

prisoner could not be convicted of stealing a sovereign. That was a varience. The prosecutrix was bound to prove that shillings had been stolen. Having particularized the money stolen, it should have been proved shilling-pieces were stolen. [Grove, J. The allegation is not nineteen pieces of the current coin called shillings, but 19s. in money. [Blackburn, J. That means, I should say, money to the value of 19s.] The word shillings must be taken as descriptive of the thing stolen, and must be proved. Archb. Crim. Pleadings, 190, (edit., 1862); Reg. v. Deeley, 1 Moo. C. C., 303; Reg. v. Owen, 1 Moo. C. C., 118; Reg. v. Craven, Russ. & Ry., 46; Reg. v. West, Dears. & B., 109; 7 Cox C. C., 183; Reg. v. Bond, 1 Den. C. C., Reg. v. Jones, 1 Cox. C. C., 105.

No counsel appeared for the prisoner.

The judges retired to consider, and on their return into court.

Cockburn, C. J., said: The majority of the judges are of opinion that the prisoner was not properly convicted of stealing the 19s. charged in the indictment, for she had not taken them from the prosecutrix, and could not therefore be convicted on this indictment. The majority of the judges do not say that she might not have been convicted on an indictment charging her with stealing the sovereign if the issue had been properly left to the jury. Upon the present indictment, however, she must be discharged.

Conviction quashed.

REG. v. SLOWLY & HUMPHREY.

(12 Cox's Criminal Cases, 269.)

LARCENY.—The prisoners purchased onions from the prosecutor upon an agreement to pay money for them. The onions were delivered and received by the prisoners who refused to pay for them or to return them to the prosecutor. The jury found that they never intended to pay for the onions, and that the fraud was meditated by them from the very first to get possession of the property. *Held*, that a conviction of larceny was right.

Case reserved for the opinion of this court by Mr. Justice Byle.

The prisoners at the last Winter Assizes for the county of Sussex, at Lewes, were jointly indicted for stealing onions.

The prosecutor, having a cart loaded with onions, met the prisoners, who agreed to buy all the onions at a certain price, viz: £3 16s. for ready money, the prisoners saying: "You shall have your money directly the onions are unloaded."

The onions were accordingly unloaded by the prosecutor and the prisoners together, at a place indicated by the prisoners.

The prosecutor then asked for his money. The prisoners thereupon asked for a bill, and the prosecutor made out a bill accordingly. One of the prisoners said they must have a receipt from the prosecutor, and in the presence of the other made a cross upon the bill, put a penny postage stamp on it, and then said they had a receipt, and refused to restore the onions or pay the price.

The next morning the prisoners offered the onions for sale at Hastings.

The jury convicted both the prisoners of larceny, and said they found that the prisoners never intended to pay for the onions, and that the fraud was meditated by both the prisoners from the beginning. The prisoners' counsel insisting that under these circumstances there was no larceny, I reserved the point for the decision of the Court of Criminal Appeal.

[Signed,] J. Barnard Byles.

Willoughby, for the prisoners. The prisoners were not properly convicted of larceny, for the prosecutor gave credit to the prisoners for the £3 16s., and delivered the onions to them on such credit.

Kelly, C. B. What credit was given? The case is like Reg. v. McGrath, 39 L. I. 7, M. C.; 11 Cox C. C. 347. This is a different case. There the money was obtained against the will of the owner. Here the onions were unloaded by the prosecutor. Moreover, it was proved, though not stated in the case, that the prosecutor called on the prisoners in the evening for the money.

The learned counsel then cited 2 East P. C. 669 (edit. A. D. 1805), and the cases of Rex. v. Harvey, and Reg. v. Nicholson, there cited. Also Rex. v. Oliver, 2 Leach, 1072; R. v. Adams, 2 Rus. on Crimes, 209; Tooke v. Hollinsworth, 5 T. R., 231, Buller, J.; Reg. v. Small, 8 C. & P., 46; Reg. v. Stewart, 1 Cox C. C. 174; Reg. v. McKale, 37 L. I., 97, M. C.; 11 Cox C. C. 32.

Pocock, for the prosecution, was not called upon to argue.

Kelly, C. B. I am of opinion that the conviction should be affirmed. If in this case it had been intended by the prosecutor to give credit for the price of the onions, even for a single hour, it would not have been larceny, but it is clear that no credit was given, or ever intended to be given. Any idea of that is negatived by the statement in the case that the prisoners agreed to buy for ready money. In all such sales the delivery of the thing sold, or of the money, the price of the

thing sold, must take place before the other, i. e., the seller delivers the thing with one hand while he receives the money with the other. No matter which takes place first, the transaction is not complete until both have taken place. If the seller delivers first before the money is paid, and the buyer fraudulently runs off with the article, or if, on the other hand, the buyer pays first and the seller fraudulently runs off with the money without delivering the thing sold, it is equally larceny.

MELLOR, J. I am of the same opinion. The prisoners obtained possession of the onions by a trick, and never intended to pay for them, as the jury found. From the very first they meditated the fraud to get possession of them, which puts an end to any question of its being larceny or not.

PIGOTT, B. The facts are that the prosecutor never intended to part with the possession of the onions except for ready money. He did part with the possession to the prisoners, who obtained the possession by fraud. The prisoners then brought in aid force to keep possession, and refused to restore the onions or pay the price. Therefore, the possession was obtained against the will of the prosecutor.

DENMAN, J., and POLLOCK, B., concurred.

Conviction affirmed.

LOOMIS v. PEOPLE.

(67 N. Y., 322.)

LARCENY.—Where two conspired together to fraudulently obtain the money of another, and in pursuance of the conspiracy threw dice, and one of them, apparently losing, persuades the prosecutor to let him have his money to bet on the game, on the false assurance that he would win and would give it back immediately, and that he had a check for $500 in his pocket which he would get changed and repay the money if he lost, and the money was apparently lost, and the confederates disappeared without repaying the money so obtained. *Held*, that the two thus conspiring were guilty of larceny.

MILLER, J. The prosecutor was induced to place his money upon a game of hazard, upon the assurance of Lewis, one of the prisoners, that he was to win, and he would have his money back, or that, in case of loss, other money would be procured upon a check which Lewis claimed to have in his possession, and paid in place of that lost.

It is evident that the prisoner Lewis and his confederate Loomis conspired fraudulently and feloniously to procure the money of the prosecutor, and by means of a trick and device, succeeded in converting it to their own use. Upon the facts proven, the question to be determined is whether a case of larceny is established. The jury have found that it was the intention of the prisoners to convert the money without the consent and against the will of the prosecutor, and that he did not intend to part with his property. I think that the conclusion at which they arrived was abundantly warranted by the

evidence, and the conviction of the prisoners can be upheld upon well-established legal grounds. It is contended that the conviction was erroneous, because the prosecutor voluntarily parted with his money, not expecting to receive back the same bills, but others in their place, and hence the crime was not made out. It must be conceded that, in order to establish the offense of larceny, there must be a trespass, and without this element the offense is not complete: 1 Hawk. Pl. Cr., section 1, p. 108; 3 Russ. on Crimes (5th Amer. ed.), 85; McDonald v. The People, 43 N. Y., 61; Hildbrand v. The People, 56 Id., 394. Even although the owner is induced to part with his property by fraudulent means, yet if he actually intended to part with it, and delivers up possession absolutely, it is not larceny: People v. Smith, 53 N. Y., 111.

In this case, considering the circumstances, it cannot be deemed, we think, that the prosecutor intended to part with the possession or ownership of the money. It was handed over for a particular purpose, with no intention to loan it, or absolutely to surrender the title, and it was only in case of its loss that other money was to be procured upon the check, which the prisoner Lewis claimed to have in his possession. The prosecutor then had parted with no absolute right to the same, nor transferred any title to the bills before the contingency of the loss occurred, and the use of the money was but temporary, and for a specified object. Certainly, when it appeared that no loss had happened, the temporary possession was at an end, and to all intents and purposes the money reverted to the prosecutor. The alleged loss, brought about by the criminal and fraudulent conduct of the prisoners, could not change the title, or in any way transfer the ownership to them. They did not thereby acquire any right, and it cannot seriously be questioned that at this time, if not before, the prosecutor would have been justified in taking the money forcibly, or could have maintained an action for the recovery of the same identical bills. It was his money, and the conversion of it by the prisoners, before it was won, was without a semblance of lawful authority, and, as the jury had found, with a felonious intent.

It was a clear case of larceny, as marked and significant in

its general features as if the prisoners had wrongfully seized and appropriated it when first produced. The form of throwing the dice was only a cover, a device and contrivance to conceal the original design, and so long as there was no consent to part with the money, does not change the real character of the crime. While the element of trespass is wanting, and the offense is not larceny, where consent is given, and the owner intended to part with his property absolutely, and not merely with a temporary possession of the same, even although such consent was procured by fraud, and the person obtaining it had an *animus furandi*, yet, as is well said by a writer upon criminal law:—

"It is different where, with the *animus furandi* a person obtains consent to his temporary possession of property, *and then converts it to his own use.* The act goes further than the consent, and may be fairly said to be against it. Consent to deliver the temporary possession is not consent to deliver the property in a thing, and if a person, *animus furandi*, avail himself of a temporary possession for a specific purpose, obtained by consent to convert the property in the thing to himself, and defraud the owner thereof, he certainly has not the consent of the owner. He is, therefore, acting against the will of the owner, and is a trespasser, because a trespasser upon the property of another is doing some act upon the property against the will of the owner."

In the case at bar there was no valid agreement to part with the money absolutely, and no consent to divest the owner of his title.

It was passed over for a mere temporary use at most, and the legal title remaining in the owner, the conversion of it by the prisoners, within the rule cited, was larceny. The reports are full of familiar illustrations of this rule, as a reference to some of the leading cases will show. In Hildebrand v. The People, *supra*, a fifty-dollar bill delivered to the prisoner, to pay ten cents and return the change, was kept by him, and it was held to be larceny. It was intended that after taking out the ten cents other money should be exchanged, and to this extent and for this purpose the prisoner had lawful possession of the money. In that case, as here, the money was not absolutely

parted with, but surrendered for a specific purpose, and the custody temporarily transferred. It is true that in the case last cited, the delivery was held not to be complete until the change was returned, but that does not alter the principle when there was but a temporary possession, as there was no transfer of the ownership. See, also, *McDonald v. The People, supra.* Nor does it change the aspect of the case when by trick or device the owner is induced to part with the custody or naked possession of property for a special purpose to one who receives it *animus furandi*, and still means to retain a right of property: Smith v. The People, 53 N. Y., 111. In Rex v. Harner 1 Leach, 305, where the prosecutor was decoyed into a public house, and money obtained from him for the purpose of playing at cards, and appropriated by the prisoners, it was held that if there was a preconcerted plan to obtain the money, and an *animus furandi*, it was felonious. This case is analogous and directly in point, and it is difficult to draw any distinction between the case cited and the case at bar, as there was quite as strong grounds for finding the felonious intent in the latter case as in that cited.

In Rex v. Robson, R. & R. C. C., 413, where there was a plan to cheat the prosecutor out of his property under color of a bet, and he parted with the possession only to deposit it as a stake with one of the confederates, the taking was held to be felonious. This case is directly in point, and as a decision by the twelve judges is entitled to great weight. The cases referred to, without citing others which bear in the same direction, are sufficient to sustain the conviction, and the cases which have been cited as upholding the principle that there was no such parting with the property as to constitute larceny, do not, I think, go to the extent which is claimed. After a careful examination, without considering them in detail, suffice it to say, that perhaps a single exception Reg. v. Thomas, 9 C. & P., 741, which was a *nisi prius* decision, and is criticised in the opinion in Hildebrand v. The People, they are all clearly distinguishable from the case now considered, and the weight of authority is decidedly in an opposite direction.

There is, to be sure, a narrow margin between a case of larceny and one where the property has been obtained by false pre-

tenses. The distinction is a very nice one, but still very important. The character of the crime depends upon the intention of the parties, and that intention determines the nature of the offense. In the former case, where, by fraud, conspiracy, or artifice, the possession is obtained with a felonious design, and the title still remains in the owner, larceny is established. While in the latter, where title, as well as possession, is absolutely parted with, the crime is false pretenses. It will be observed that the *intention* of the owner to part with his property is the gist and essence of the offence of larceny, and the vital point upon which the crime hinges, and is to be determined. Although the present case is on the border line, yet it is quite clear that it was, as the evidence stood, a fair question for the jury to decide as to the intent of the prisoners feloniously to take the money, and as to the intention of the prosecutor, to part with the ownership of the same.

These questions were fairly submitted by the judge to their consideration, and as there was no error in the charge, or in any other respect on the trial, the conviction must be affirmed.

All concur; Rapallo, J., absent.

Judgment affirmed.

NOTE.—In Smith v. People, 53 N. Y., 111. Smith, the plaintiff in error, called upon one Sarah March, and informed her that her husband, Charles March, was arrested and locked up on a charge of striking a man over the head with a chair, and that her husband had sent him to her to get some money, and unless she sent it he would be locked up all night. Not having any money, and, upon the solicitation of the prisoner, believing his statements to be true, she gave him a watch, chain and a locket or cross, and two dollars in money, belonging to her husband, which property he was to pawn and give the ticket and money to her husband. The statement of the prisoner was false. Charles March, the husband, never had been arrested, never sent him for any money, and did not know him. The plaintiff in error appropriated the property so obtained to his own use.

The plaintiff in error was convicted of larceny, and the Court of Appeals sustained the conviction.

ALLEN, J. said: "The accused obtained the custody of the chattles and money of the prosecutor from his wife by a fraudulent device and tricks, and for a special purpose, connected with the falsely represented necessities of the owner, with the felonious intent to appropriate the same to his own use. He did not pawn or pledge the goods, as he proposed to do, but did appropriate the same to his own use, in pursuance of the feloni-

ous intent with which he received them. This constitutes the crime of larceny.

"The owner did not part with the property in the chattles, or transfer the legal possession. The accused had merely the custody; the possession and ownership remaining in the original proprietor.

"The rule is, that when the delivery of goods is made for a certain special and particular purpose, the possession is still supposed to reside, not parted with, in the first proprietor.

REGINA v. DE BANKS.

(Court of Criminal Cases Reversed, May 1884.)

LARCENY AS BAILEE.—The prisoner was engaged by the owner of a horse to look after it for a few days with authority to sell it. He sold it for £15. The owner having sent his wife to receive the money the prisoner showed her a check, but refused to pay it over, saying that he would go to the bank to cash it. He came out of the bank and said they would not cash it. Being again asked to hand it over, he ran away. Upon these facts a conviction of larceny was sustained.

The prisoner was indicted at the Shropshire Quarter Sessions for embezzling the money of his employer.

The evidence, so far as it is material to the point reserved, was as follows:

Joseph Sake, the prosecutor, proved: On the 11th day of January I drove a chestnut mare into Chester with prisoner; I left her at Mr. Wild's; I engaged the prisoner to look after her; I said to him, "Do the mare well, and I will be here on Wednesday morning and will pay you for your work." He was to have charge of her until I came; I told him to pay for the keeping till I came; I meant him to look after her altogether; I should not have objected to his doing anything else; on Saturday, January 12th, I saw prisoner; I asked him how the mare looked, and he said she was as lame as a cat; he

said he had removed her to his father's house; I said I should be at Chester by the first train; I told him the mare should be sold on the Wednesday morning when I went, as she would not do for use; I sent my wife on that morning; I have never received a farthing from prisoner on account of the mare.

Annie Suker, wife of prosecutor, proved: I went to Whitchurch on the 16th of January; I saw prisoner in the street; I asked him if he had sold the mare; he said he had not; I went with him to Wild's stable; saw the mare taken out of the stable in the street; prisoner was riding the mare about the fair; Mr. Foster bought her; prisoner, Mr. Foster and Arthan went to the Queen's Head together; I was outside the door and watched; I saw Foster give prisoner some money; prisoner came out and showed me a check; he did not give it to me; he said we would go to the bank and get it cashed; I asked him for it several times, but he would not part; he told me he had sold the mare for £13; he came out of the bank and said they would not cash him the check; I asked him to give it to me, and said I would pay his expenses; he would not do so; I said he must come with me to Whitchurch, and I must have either the money or the mare; I had great difficulty in getting him to the station; at Whitchurch, when we got to the gasworks, he bolted down a little alley which leads to the canal; I ran after him and called, but he did not answer; I have never received any money for the mare.

Joseph Axthan proved the sale of the mare by the prisoner to Foster, and payment of £15 to the prisoner.

Robert Thomas, sergeant of police, proved that the prisoner absconded from Whitchurch on the 18th of January. The prisoner was arrested at Chester on the 31st of January.

The chairman held there was no evidence to go to the jury of the defendant's employment as a servant, so as to make him guilty of embezzlement. It was then contended, on behalf of the defendant, that there was no evidence of the larceny of £15. The case was left to the jury, who found "that the prisoner had authority to sell the mare, and had converted the money to his own use," and a verdict of "guilty of larceny," was recorded.

The question reserved for the opinion of the court was

whether there was any evidence of larceny which could properly have been left to the jury.

Lord COLERIDGE, C. J. I think this conviction may be supported. There may be considerable room for doubt whether, under the circumstances, the prisoner was not intrusted as a servant; but we have not now to consider this point, the chairman having ruled otherwise, and the jury having not had the question left to them. The only point remaining is whether there is any evidence of larceny. I think the effect of the evidence is that the prisoner was there to see the mare, and receive the money for the prosecutor if he were present, and, if not present, then to sell and hold the money for him or his agent until he should come. I hold that the prisoner was a bailee of the money for the wife, who attended as agent for the prisoner. She demanded the money, the prisoner refused, and thereupon the case falls directly within the words of the statute.

GROVE, J. I am not free from doubt as to whether the prisoner was in position as bailee; although the evidence is ample that he took the money, yet it is clear that the money was not given to him on behalf of the prosecutor. But I think he is not the less a bailee by reason of his not having received the money direct from the hand of the prosecutor.

FIELD, J. I agree, but not without some hesitation, that this conviction ought to be confirmed. The question is whether there was reasonable evidence that the prisoner was a bailee. It is important to note that the sale was for cash, that there had been no previous dealing between the parties, and that the prisoner was not a horse dealer or agent who might probably be justified in mixing the money received with his own, as has been in the case of a stock-broker charged with a similar offence.

A. L. SMITH, J. The difference of opinion between the members of the court arises more upon a question of fact than of law. Upon the evidence before us I agree with the majority of the court that the prisoner was rightly convicted as a bailee of the money demanded of him by the wife of the prisoner.

Conviction affirmed.

STEPHEN, J. Dissented, holding that one who received money, with no obligation to return the identical coin, is not a bailee of such coin within the 24 and 25 Vic., c. 96, § 3, under which the prisoner was convicted.

NOTE.—It is not material whether the servant be paid by certain wages, or by percentage on the receipts, or by a share of the profits arising from his labor. It is immaterial, also, whether the employment be permanent, or occasional only, or even confined to the particular instant. Arch. Crim. Prac. & Pl. (8 ed.) 1347.

Who will be considered "officers," "agents," "clerks," and "servants." See Ker. v. People, p. 25; State v. Foster, p. 54; People v. Dalton, p. 59; Queen v. Foulkes, p. 87; U. S. v. Hartwell, p. 92; People v. Sherman, p. 91.

Who will not be considered as such, Queen v. Negus, p. 80; State v. Kent, p. 78; People v. Allen, p. 83; U. S. v. Hartwell, p. 92.

BAKER v. STATE.

(29 Ohio St., 184.)

LARCENY BY FINDER OF LOST GOODS.—Where the defendant is charged with the larceny of lost goods, he should be convicted, if it appears that, when he found them, he intended to appropriate them to his own use, having reasonable grounds for believing, at the time of the finding, that the owner could be ascertained.

The defendant asked for an acquittal on the evidence. His request was refused by the trial court, and the refusal was assigned for error.

MCILVAINE, J. The testimony offered on the trial below shows that on the evening of April 28, 1872, the defendant below, found on a county public road, at Van Wert county, a a pocket-book containing one ten-dollar bill, at a point in the road near which he had been engaged at work during the day, and that the goods found had been lost by the owner, Hinton

Alden, at that point a few hours before. That Alden, at the time he lost the pocket-book, had been detained at that point for a short time, and within plain sight of the defendant. On the next morning Alden, who lived in the immediate neighborhood, informed the defendant of his loss, but defendant concealed the fact of finding, and afterward expended the money in the purchase of clothing. A few days after, the defendant admitted to a witness in the case, that he had found the pocket-book, and that he knew the owner, and on inquiry why he had not returned the goods to the owner, replied, "Finders are keepers." It was also shown by an admission of defendant, that the appearance of the pocket-book at the time he found it, indicated that it had been very recently lost. The law of this case is well stated by Baron Parker, in Regina v. Thurborn, 1 Dennison C. C., 387; also reported under the name of Regina v. Wood, 3 Cox C. C., 453, thus: "If a man find goods that have actually been lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny. But if he takes, with like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny."

The fact, in this case, that the defendant expended the money after he had certain knowledge of the owner, did not render him guilty of larceny, if the offence was not complete before. The loss and finding of the goods were not disputed in the court below, but the following questions were made:

1. When the defendant first took the goods upon the finding, did he intend to appropriate them to his own use? This question was fairly found against him, from the fact of concealing the finding when informed by the owner of his loss, and from his subsequent declaration that "Finders are owners."

2. Did he have reasonable grounds to believe, at the time of finding the goods, that the owner could be found? It was sufficiently proved that the defendant knew that the goods had been recently lost before the finding, and that Alden had recently been at the point where he found them. These facts

constitute reasonable grounds for believing that Alden was the owner.

Judgment affirmed.

R. v. Lavander.

(2 East's P. C., 566.)

Larceny.—A servant going off with money which his master had given him to carry to another, and applying it to his own use, is guilty of larceny.

John Lavender was indicted for larceny at common law of a certain sum of money belonging to John Edmonds. The prisoner was a servant to Edmonds, who had delivered him the money in question to carry to the house of one Thomas Flawn, and there to leave the same with him, he having agreed to give Edmonds bills for the money in a few days. The prisoner did not carry the money to Flawn as directed, but went away with it, purchased a watch and other things with part, and part remained in his possession when he was apprehended. Being found guilty, sentenced was respited for the opinion of the judges, whether this was a felony or a breach of trust; and in Easter term, 1793, all the judges held this was a felony, and that the last point in Watson's case above referred to was not law. In Trinity term following, this case was again under the consideration of the judges; when they adhered to their former opinion: and some said that the distinction between this case and Watson's, if there were any, was, that in Watson's case the money was delivered to the prisoner to be paid specifically to another person; but if the prisoner had laid out his own money to the same amount in buying licenses, it would have been a compliance with the order. He was commissioned to merchandize with the money. But they admitted that the distinction, if any, was extremely nice; and Buller, J. thought there was none: and recognized the case of R. v. Paradice before Gould, J. as good law.

R. v. FRANCIS PARADICE.

(2 East's P. C., 565.)

LARCENY.—One employed as a clerk in the day time, but not residing in the house, embezzled a bill of exchange, which he received from his master in the usual course of business with directions to transmit it by the post to a correspondent. Held larceny.

Francis Paradice was indicted for stealing a bill of exchange of £100 value, the property of William Periam. The prosecutor to whom the bill was indorsed was a draper at Devizes, and the prisoner, who was his book-keeper, on salary, kept his accounts, and received and paid money for him, but did not live in his house; but came every day there to transact his business. The prosecutor delivered the bill in question, with several others, to the prisoner, and ordered him to send them by that day's post as he had often done before, from the Devizes to the prosecutor's bank in London, as cash to be accounted for to the prosecutor. The prisoner next day asked the prosecutor's leave to go to a town in the neighborhood, which was consented to on condition that he returned the next day by 12 o'clock. The prisoner went to Salisbury, got cash for the bill, which was endorsed by the prosecutor, and next day the prisoner, was apprehended at Exeter, with part of the bill and the money.

Gould, J., before whom he was tried and convicted, respited judgment to take the opinion of the judges whether this were felony or a breach of trust. In Easter term, 1766, all the judges, except Lord Camden, who was absent, held it larceny, upon the principle that the possession still continued in the master.

Andrew J. Nichols v. The People.

(17 N. Y., 114.)

Larceny.—It is the separation of any article conveyed in bulk, by a carrier, from the whole, which constitutes the distinction between larceny and embezzlement, and this rule applies to pig iron, which is transferred by the hundred pounds, or by the ton.

The above rule might be otherwise in the case of articles having a separate identity, as barrels of flour, saw logs and the like.

Andrew J. Nichols, the plaintiff in error, was indicted for larceny of pig iron. In December, 1856, he was tried at the Erie Oyer and Terminer, and was acquitted, on the ground that the offence in the indictment was not larceny, but embezzlement. He was then indicted for embezzling the same iron.

The defendant pleaded: 1, Not guilty. 2, The previous acquittal. 3, The former trial and acquittal setting forth the former proceedings, including the indictment, averring that the offence charged in the two indictments were one, and the same offence, and not other and different offences.

The People took issue on the second, and demurred to the third plea, and the demurrer was sustained by the court.

The prisoner being convicted, sued out a writ of *certiorari*, by which the proceedings were removed into the Supreme Court, where it was held that there was no error in the conviction for embezzlement. The case was then removed, by writ of error, to the Court of Appeals.

The prisoner was master and owner of a canal boat, and as such, agreed with the owner of certain pig iron, to transport the same from Albany to Buffalo. Before reaching Buffalo the prisoner landed his boat in the night time, and put off one

hundred bars or pieces of the pig iron, each bar weighing about one hundred pounds, and all of the value of one hundred and seventy-five dollars. The balance of the iron was delivered at Buffalo. At the close of the peoples' proof, the defendant moved for his discharge, on the ground that the evidence showed that the offence was larceny, and not embezzlement as charged. The motion was denied and the prisoner excepted.

William Dorshimer, for the plaintiff in error.

Albert Sawin, for The People.

PRATT, J. It was conceded upon the argument in this case, that if the evidence upon the trial at the Oyer and Terminer established a case of larceny, the conviction was wrong. The simple question for our examination, therefore, is whether the separation of a portion of the iron from the whole, and the felonious conversion of it, constituted larceny.

At common law it is well settled that if a carrier or other bailee opens a bale or package of goods, or pierces a vessel of wine, and takes away and disposes of part of it, it is larceny, although if he has disposed of all of it, it is a breach of trust merely, Arch. Cr. Pl., 384; East's Cr. L., 697; under this it has been held that taking an entire bale from several would not constitute the offense, 5 *Carr. v. Payne*, 533. Various reasons have been assigned by commentators for this distinction, none of which are entirely satisfactory. It has been said to be "such proof of the original felonious intention that it has always been held to be larceny." Kel. 81, 82. As suggested in 2 East's Criminal Law, p. 697, if taking a part is evidence of the original felonious intent, no less, surely, would the taking of the whole be. Again, it is said by BLACKSTONE, that if a carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away a part, it is larceny, for here the *animus furandi* is manifest, since he had otherwise no inducement to open the goods. 4 Black., 230.

But the prevailing principle upon which the distinction is placed is, that the act of breaking the package or bales is an act of trespass in the carrier, by which the privity of contract is determined; and although the principle is said to stand

more upon positive law, not now to be questioned, than upon sound reasoning, 2 East's Cr. L., 695; yet it seems to be admitted to be the correct principle in all cases in which the question has been canvassed. 1 Hale, 504; 1 Hawk., ch. 3, §§ 5, 7; 3 *Coke Inst.*, 107.

In the case at bar it is insisted, on the part of the people, that the bailee can commit larceny only where he actually breaks a bale or package; that it is this breaking alone which can determine the privity of contract, and render the asportation by the carrier a trespass. But this, I think, is too narrow a construction of the rule, and one not sustained by the commentators and adjudications. Any separation of a part from the whole would seem to be as much a trespass as the breaking of a package. Indeed, it is the separation that constitutes the trespass. This seems to be conceded upon the argument in regard to grain and things of that kind, but a distinction was attempted to be drawn between grain and iron in the form of pigs.

But I am unable to perceive the force of the distinction. What the rule might be in the case of articles having, as it were, a separate identity, like barrels of flour, saw logs and the like, it is not necessary to inquire. In this case, the iron was in a condition in which it is transferred in bulk, by the hundred pounds or by the ton, and not by count. Although more readily separated by individual count than the kernels of grain, it is not a subject of trade or commerce by count any more than grain is; and a separation of part from the rest would seem to be just as much a trespass as the separation of a portion of a load, in bulk, of corn, apples or potatoes, from the whole would be. It is this separation of any article conveyed in bulk, by a carrier, from the whole, which constitutes the distinction between larceny and embezzlement.

In 2 East's Criminal Law, p. 698, it is said: "The separation of the part of the goods from the rest, with a felonious intent, seems, however, to be material when they are delivered as one entire body or mass, though no case or package be broken, because such an act equally evinces a determination of the privity of the contract." He cites 1 Roll's Abridgment, p. 73, § 16, where it was held that "if a man says to a miller, who keeps

a corn mill, 'thou hast stolen three packs of meal,' an action lies; for, although the corn was delivered to him to grind, nevertheless, if he steal it, it is felony, being taken from the rest."

So HAWKINS, book 1, ch. 33, says: "Those having possession of goods by the delivery of the party may be guilty of felony by taking away a part thereof with an intent to steal it, as if a carrier open a pack and take out a part of the goods, or a weaver who has received silk to work, or a miller who has corn to grind, take out part with intent to steal it, in which case it may not only be said that such possession of a part, distinct from the whole, was gained by wrong and not delivered by the owner, but that it was obtained basely, fraudulently and clandestinely, in hopes to prevent its being discovered at all, or fixed upon when discovered." This latter reason, I apprehend, would apply much more forcibly to the separation of a part from the whole when it is in open bulk than when a package is broken open.

In Rex v. Howell, 7 Carr. & Payne, 325, the prisoner was employed to land a boat load of stoves from a ship, and he landed all but two, which he secreted at the bottom of the boat, and one, which he landed, he carried to his mother's house. The court held, in the words of PATTERSON, J., that the non-delivery of the two was not larceny, "but the prisoner separating one of the articles from the rest, and taking it to a place different from its destination, was, if he did it with intent to appropriate it to his own use, equivalent to breaking bulk, and therefore would be sufficient to constitute larceny."

The learned judge who read the opinion in the court below, suggested that the decision of this case might have been based upon the actual delivery of the stoves at the place of destination and a subsequent asportation, which would constitute larceny within all the cases. It is enough that the court in that case did not put their ruling upon any such ground; and I assume, from the remark of Justice PATTERSON, that the stove was taken directly from the boat to the place where it was found, notwithstanding the imperfect statement of the facts which would indicate that it was first landed.

In Commonweath v. Brown, 4 Mass., 580, a wagon-load of

goods, consisting of several packages, was delivered to be transported from one place to another, and the prisoner fraudulently took away one of the packages; it was held to be larceny. This was carrying the rule much farther than is necessary in this case, but the court considered that the goods were delivered to the prisoner already loaded, "as one mass or body, and his taking away one package was separating a part from the whole, and thus he determined the supposed privity of contract."

So in Commonwealth v. James, 1 Pick., 375, the same court held that where a miller having received barilla to grind, fraudulently retained a part of it, returning a mixture of plaster of paris, it was larceny.

The case of Rex v. Madox, 1 Russ. & Ry., 92, was cited in the court below as a case in point against the prisoner. In that case the prisoner, who was the master of a vessel, received two hundred and eighty casks of butter to carry in his ship; most of the casks were stowed in the hold and battened down, but some were put upon deck. The master disposed of thirteen of those upon deck upon the voyage. It was held that this was not larceny, although it seemed to be admitted by the court that if the prisoner had broken bulk, by taking the thirteen from those battened down, it would have been larceny. This case, it seems to me, is not in point at all. These casks were delivered to the master by count, and not in bulk, and consequently there was clearly no breaking bulk, no taking part from the whole of the mass or bulk delivered, but it was a mere separation of a number of separate articles from the whole number. The casks were clearly what might be deemed separate packages, as they lay upon the deck. But it seems to be conceded that if the master had taken them from those battened down, it would be larceny.

In the case of Rex v. Fletcher, and others, 4 Carr & Payne, 545, the goods were in packages, and were taken out, but the prisoners were acquitted on the ground that it did not appear that the packages had been broken open while in their possession. If the prisoners had broken open the packages it would have been larceny within all the cases. I do not see, therefore, wherein the case has any bearing upon the point in this case.

In Rex v. Pratley, 5 Carr & Payne, 533, the prisoner was employed to carry in his cart three trusses of hay, and he took away one of them, which was found in his possession but not broken up. It was held not larceny. Here there was clearly no breaking bulk. The three trusses were three separate packages, and the conversion of one whole package was held by the court not to be larceny. If the pig iron had been put up in separate boxes, and the prisoner in the case at bar had been indicted for stealing one or more boxes, that case would have been in point.

I have now referred to the principal cases upon the question, and it seems to me quite clear that this was breaking bulk within the meaning of the rule as established by those cases. The separation of a part from the whole bulk or mass was a trespass, determining the supposed privity of contract; and I think our statute for the punishment of embezzlement is based upon this view of the law. It provides "that if any carrier or other person to whom property shall be delivered to be transported for hire shall convert, etc., in the mass, as they were delivered, without breaking the box, trunk, pack or other thing in which they shall be contained, he shall be punished in the same manner as if he had taken, etc., such goods after breaking the trunk, box, pack or other thing containing the same, or after separating any of them from the other." The language of this provision clearly recognizes the separation of a part from the rest as breaking bulk.

This case turns upon a narrow point, and no actual injustice to the prisoner, perhaps, would be done by affirming the judgment below; but our decisions are precedents for future cases, and although this prisoner may go unwhipt of justice in consequence thereof, yet we must propound the law as we find it, whatever the consequences may be in this particular case.

SELDEN, ROSEVELT, HARRIS and STRONG, Js., concurred in this opinion.

DENIO and COMSTOCK, Js., dissented. Judgment reversed, and the discharge of the prisoner ordered.

NOTE.—For cases sustaining the distinction between larceny and embezzlement, see Com. v. Berry, Ante p. 109; R. v. Bazely, Ante p. 14; R.

v. Lavender, Ante p. 181; Kribs v. People, Ante p. 18; Simco v. State, Ante p. 20; R. v. Paradice, Ante p. 182; and for cases not observing the distinction, see Kerr v. People, Ante p. 25; Lowenthal v. People, Ante p. 138; State v. Foster, Ante p. 54; People v. Dalton, Ante p. 59.

REG. v. MIDDLETON.

(Court of Criminal Appeal.)

(12 Cox's C. C., 260.)

LARCENY.—A depositor in a post-office savings bank presented a warrant for the withdrawal of 10s., the clerk at the post-office, instead of referring to the proper letter of advice for 10s., referred by mistake to a letter of advice for £8. 16s. 10d., which last mentioned sum the depositor received and departed. Upon trial the jury found him guilty of larceny. The case being reserved for the opinion of the court, the conviction was affirmed.

CASE reserved for the opinion of this court by the Deputy Recorder of London.

At the session of the Central Criminal Court, held on Monday, 23d September, 1872, George Middleton was tried before me for feloniously stealing certain money to the amount of £8. 16s. 10d., the moneys of the Postmaster General.

The ownership of the money was laid in, other counts, in the Queen and in the mistress of the local post-office.

It was proved by the evidence that the prisoner was a depositor in a post-office savings bank, in which a sum of 11s. stood to his credit.

In accordance with the practice of the bank, he duly gave notice to withdraw 10s., stating in such notice the number of his depositor's book, the name of the post-office, and the amount to be withdrawn.

A warrant for 10s. was duly issued to the prisoner, and a letter of advice was duly sent to the post-office at Nottinghill to pay the prisoner 10s. He presented himself at that post-office and handed in his depositor's book and the warrant to the clerk, who, instead of referring to the proper letter of advice for 10s., referred by mistake to another letter of advice for £8. 16s. 10d., and placed upon the counter a £5. note, three sovereigns, a half sovereign, and silver and copper, amounting altogether to £8. 16s. 10d.

The clerk entered the amount paid, viz.: £8. 26s. 10d., in the prisoner's depositor's book, and stamped it, and ths prisoner took up the money and went away. The mistake was afterwards discovered, and the prisoner was brought back, and upon being asked for his depositor's book, said he had burned it.

Other evidence of the prisoner having had the money was given.

It was objected by counsel for the prisoner that there was no larceny, because the clerk parted with the property, and intended to do so, and because the prisoner did not get possession by any fraud or trick.

The jury found that the prisoner had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster General when he took it up.

A verdict of guilty was recorded, and I reserved for the opinion of the Court of Crown Cases Reversed, the question whether, under the circumstances above disclosed, the prisoner was properly found guilty of larceny.

I discharged the prisoner on recognizance with sureties to appear and receive judgment when called upon.

[Signed.] THOMAS CHAMBERS.

No counsel appeared for the prisoner.

The Attorney General (Metcalf & Slade with him) for the prosecution.

January 25. KELLY, C. B., said the majority of the judges were of opinion that the conviction should be affirmed. The reason for the judgment will be delivered at a future day.

June 7. Judgments of the court were this day delivered.

Bovill, C. J. This was a case in which the prisoner was indicted at the Central Criminal Court for feloniously stealing money, the property of the Queen, or of the Postmaster General. On the trial he was found guilty, but a case was reserved for the opinion of the Court of Criminal Appeal, which came on in the ordinary course before five judges; but on the argument they were not agreed, and the case was adjourned, to be argued before all the judges. Pollock, B., was obliged to be absent at chambers, and Quain, J., was unwell, but the other judges, fifteen in number, heard the case, and after time taken to consider, eleven of those fifteen judges were of opinion that the conviction was right and ought to be affirmed; my brothers, Martin, Bramwell, Brett and Cleasby dissented. Judgment was accordingly given in accordance with the opinion of the majority; but as it was thought important that the grounds of the decision should be accurately known, it was announced that the reasons of the judgments would on a subsequent day be delivered in writing.

I will now proceed to deliver the judgment of the Lord Chief Justice and of my brothers Blackburn, Mellar, Lush, Grove, Denman, and Archibald, which is as follows:

The points raised by the case are in effect three. The uniform course of indictment for larceny, from the earliest times, has been to allege that the prisoner "feloniously stole, took, and carried away," the goods of a named person, and Lord Hale in his Pleas of the Crown, vol. 1, p. 165, states with perfect accuracy that the words "feloniously stole and took," are essential to the crime. In the present case the jury have found that the prisoner had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster General when he took it up. So far, therefore, as the guilty knowledge and felonious intention are ingredients in the crime of stealing, we must take it as proved that the prisoner was guilty. But the case states facts which raise the doubt whether, under the circumstances stated, this was a "taking," and also whether, it was a "stealing" within the meaning put by the law on these averments in an indictment for larceny. The circumstances which

raise that doubt are as follows: Assuming that the clerk who actually was engaged in the transaction had such authority from the Postmaster General that all he did is to be taken as done by the Postmaster General, it is the first question whether the money can be said to have been *taken* by the prisoner within the meaning of the averment, inasmuch as the clerk (who on this hypothesis is equivalent to the Postmaster General,) certainly meant that the prisoner should take up that money, though he only meant this because of a mistake he made as to the identity of the prisoner with the person really entitled to that money. Then a second question arises, whether it can be properly said that he stole the money, inasmuch as the clerk, and therefore on this hypothesis the Postmaster General, intended that the property in the money should belong to the man before him, though he intended that in consequence of a mistake as to his identity, and the prisoner from the beginning knew of the mistake, and had at the time of the taking the guilty intention to steal the money. A third question arises in the event of the first two questions being determined in favor of the prisoner, viz., whether the clerk really had such general authority as to represent the Postmaster General, or whether his authority was not limited to paying the money specified in the letter of advice, viz., 10s, which special authority, if it was so limited, he did not pursue. The majority of the judges, eight in number, have formed their judgment on the decision of the first two points in favor of the Crown, which therefore renders it unnecessary for them to decide the last. The Lord Chief Justice of the Common Pleas and the Lord Chief Baron and my brother Keating, who agree with the majority in thinking the conviction should be affirmed, do so solely on the last ground, that the authority of the clerk was a special authority not pursued, and their reasons are stated in two separate judgments. It is not to be understood that the eight who form the rest of the majority decide this question the other way, but merely that they consider it unnecessary to decide it at all. We now proceed to state the reasons on which we think it ought to be held that there was under the circumstances stated a "taking," within the meaning of the avermented in the indictment. We agree that, according to the decided cases, it

is no felony at common law to steal goods if the goods were already lawfully in the possession of the thief, and that, therefore, at common law, a bailee of goods, or a person who finds goods lost, and not knowing nor having the means of knowing whose they were, takes possession of them, is not guilty of larceny if he subsequently, with full knowledge and a felonious intention, converts them to his own use. It is, to say the least, very doubtful whether this doctrine is either wise or just, and the legislature, in the case of bailees, have by statute enacted that bailees stealing goods, etc., shall be guilty of larceny, without reference to the subtle exceptions engrafted by the cases on the old law, but in such a case as the present there is no statute applicable, and we have to apply the common law. Now, we find that it has been often decided that where the true owner did part with the physical possession of a chattel to the prisoner, and, therefore, in one sense the taking of the possession was not against his will, yet, if it was proved that the prisoner from the beginning had the intent to steal, and with that intent obtained the possession, it is a sufficient taking. We are not concerned at present to inquire whether originally the judges ought to have introduced a distinction of this sort, or ought to have left it to the legislature to correct the mischievous narrowness of the common law, but only whether this distinction is not now established, and we think it is. The cases on the subject are collected in Russell on Crimes, (4th ed.) vol. 2, p. 201. Perhaps those that most clearly raise the point are Davenport's case and Savage's case, 2 Russell, 201. In the present case the finding of the jury, that the prisoner at the moment of taking the money had the *animus furandi*, and was aware of the mistake, puts an end to all objection arising from the fact that the clerk meant to part with the *possession* of the money. On this part of the case there is no difference of opinion. On the second question, namely, whether, assuming that the clerk was to be considered as having all the authority of the owner, the intention of the clerk, such as it was, to part with the *property* prevents this from being larceny, there is more difficulty, and there is, in fact, a serious difference of opinion, though the majority, as already stated, think the conviction right. The

reasons which lead us to this conclusion are as follows: At common law the property in personal goods passes by a bargain and sale for consideration, or a gift of them accompanied by delivery, and it is clear from the very nature of the thing that an intention to pass the property is essential both to a sale and to a gift. But it is not at all true that an intention to pass the property, even though accompanied by a delivery, is of itself equivalent to either a sale or a gift. We will presently explain more fully what we mean and how this is material. Now it is established that where a bargain has been made between the owner of a chattel and another, by which the property is transferred to the other, the property actually passes, though the bargain has been indeed by fraud. The law is thus stated in the judgment of the Exchequer Chamber in Clough v. London and Northwestern Railway Company, 7 L. Rep. Exch. 34, where it is said: "We agree completely with what is stated by all the judges below, that the property in the goods passed from the London Piano Forte Company to Adams by the contract of sale. The fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. . . . . We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind." It follows obviously from this, that no conversion or dealing with the goods before the election is determined can amount to a stealing of the vendor's goods, for they had become the goods of the purchaser, and still remained so when the supposed act of theft was committed. There are accordingly many cases, of which the most recent is R. v. Prince, 11 Cox C. C. 193, which decide that in such a case the guilty party must be indicted for obtaining the goods by false pretences, and cannot be convicted of larceny. In that case, however, the money was paid to the holder of a

forged check, payable to bearer, and therefore vested in the holder, subject to the right of the bank to divest the property. In the present case the property still remained that of the Postmaster General, and never did vest in the prisoner at all. There was no contract to render it his which required to be rescinded; there was no gift of it to him, for there was no intention to give it him or any one. It was simply a handing it over by a pure mistake, and no property passed. As this was money, we cannot test the case by seeing whether an innocent purchaser could have held the property; but let us suppose that a purchaser of beans go to the warehouse of a merchant with a genuine order for so many bushels of beans, to be selected from the bulk, and so become the property of the vendee, and that by some strange blunder the merchant delivers to him an equal bulk of coffee. If the coffee was sold, not in market overt, by the recipient to a third person, could he retain it against the merchant, on the ground that he had bought it from one who had the property in the coffee, though subject to be divested? We do not remember any case in which such a point has arisen, but surely there can be no doubt he could not, and that on the principle enunciated by Lord Abinger, in Chanter v. Hopkins, 4 M. & W. 404, where he says: "If a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas, the contract is to sell peas, and if he sends him anything else in their stead it is a non-performance of it." We admit that the case is undistinguishable from the one supposed in the argument of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this: Whether, at the time he took the sovereign, he was aware of the mistake, and had then the guilty intent, the *animus furandi*. But it is further urged that if the owner, having power to dispose of the property, intended to part with it, that prevents the crime from being larceny, though the intention was inoperative, and no property

passed. In almost all the cases on the subject the property had actually passed, or at least the court thought it had passed; but two cases, Reg. v. Adams, 1 Den. C. C. 38, and Reg. v. Atkinson, 2 East P. C. 673, appear to have been decided on the ground that an intention to pass the property, though inoperative, and known by the prisoner to be inoperative, was enough to prevent the crime from being that of larceny. But we are unable to perceive or understand on what principle these cases can be supported, if Davenport's case and the others involving the same principle are law; and, though if a long series of cases had so decided, we should think we were bound by them, yet we think that in a court such as this, which is in effect a court of error, we ought not to feel bound by two cases which, as far as we can perceive, stand alone, and seem to us contrary, both to principal and justice.

BOVILL, C. J., then read his own judgment, in which Keating, J., concurred. The proper definition of larceny according to the law of England, from the time of Bracton downwards, has been considered to be the wrongful or fraudulent taking and carrying away by any person of the personal goods of another from any place, without any color of right, with a felonious intent to convert them to the taker's own use, and make them his own property, without the consent and against the will of the owner; and the question for our consideration is, whether the facts of the present case bring it within that definition. Under the act for establishing post-office savings banks, 24 Vic. c 14, deposits are received at the post-office authorized by virtue of that act, for the purpose of being remitted to the principal office, sec. 1. By section two the Postmaster General is to give an acknowledgment for such deposits, and by the fifth section all moneys so deposited with the Postmaster General are forthwith to be paid over to the Commissioners for the reduction of the National Debt. By the same section all sums withdrawn by depositors are to be repaid out of those moneys through the office of the Postmaster General; and by section three *the authority of the Postmaster General for such repayments shall be transmitted to the depositor*, who is to be entitled to repayment at the post-office within ten days. It appears to us that the moneys received by the postmasters at

their respective offices, by virtue of this act, are the property of the Crown or of the Postmaster General, and that neither the postmasters nor the clerks of the post-office have any power or authority, either general or special, to part with the property in or even the possession of, the moneys so deposited, or any part of them, to any person, except upon the special authority of the Postmaster General. In this case the prisoner had received a warrant or authority from the Postmaster General entitling him to repayment of 10s. (being part of a sum of 11s. which he had deposited) from the post-office at Notting-hill, and a letter of advice to the same effect was sent by the Postmaster General to the post-office, authorizing the payment of the 10s. to the prisoner. Under these circumstances we are of opinion that neither the clerk to the postmistress nor the postmistress personally had any power or authority to part with the five-pound note, three sovereigns, the half sovereign, and silver and copper, amounting to £8 16s. 10d., which the clerk placed upon the counter, and which was taken up by the prisoner. In this view the present case appears to be undistinguishable from other cases where obtaining articles *animo furandi* from the master of a post-office, has been held to be larceny, on the principle that the postmaster had not the property in the articles, or the power to part with the property in them. For instance, the obtaining the mail-bag, by pretending to be the mail-guard, as in Reg. v. Pearce, 2 East P. C., 603, the obtaining a watch from the postmaster by pretending to be the person for whom it was intended, as in Reg. v. Kay, D. & B., 231; 7 Cox, C. C., 298, where Reg. v. Pearce was in the judgment of the court, and the obtaining letters from the postmaster under pretence of being the servant of the party to whom they were addressed, as in Jones' case, 1 Den., 188, and in Reg. v. Gillings, 1 F. & F., 36, were all held to be larceny. The same principle has been acted upon in other cases where the person having merely the possession of goods, without any power to part with the property in them, has delivered them to the prisoner, who has obtained them *animo furandi;* for instance, such as obtaining a parcel from a carrier's servant, by pretending to be the person to whom it was directed, as in Reg. v. Longstreet, 1 Mood. C. C., 137, or obtaining goods

through the mis-delivery of them by a carman's servant, through mistake to a wrong person, who appropriated them *animo furandi*, as in Reg. v. Little, 10 Cox C. C., 559, were in like manner held to amount to larceny. In all these and other similar cases, many of which are collected in 2 Russell on Crimes, 211 to 215, the property was considered to be taken without the consent and against the will of the owner, though the possession was parted with by the voluntary act of the servant to whom the property had been intrusted for a special purpose. And where property is so taken by the prisoner knowingly, with intent to deprive the owner of it, and feloniously to appropriate it to himself, he may, in our opinion, be properly convicted of larceny. The case is very different where the goods are parted with by the owner himself, or by a person having authority to act for him, and where he or such agent intended to part with the property in the goods, for then, although the goods be obtained by fraud or forgery, or false pretenses, it is not a taking against the will of the owner, which is necessary in order to constitute larceny.

The delivery of goods by the owner upon an order which was in fact forged, as in Reg. v. Adams, 1 Den., 38, the payment of money by a banker's cashier on a cheque, which turned out to be a forgery, as in Reg. v. Prince, 11 Cox C. C., 193, and the delivering up of pledges by a pawn broker's manager by mistake, and through fraud, as in Reg. v. Jackson, 1 Mood., 119, are instances of this kind, and where the intent voluntarily to part with the property in the goods by a person who had authority to part with the property in them prevented the offence being treated as a larceny. In the present case, not only had the postmistress, or her clerk, no power or authority to part with the property in this money to the prisoner, but the clerk, in one sense, never intended to part with the £8 16s. 10d. to the prisoner who presented an order for only 10s., and he placed the money on the counter by mistake, though at the time, he, by mistake, intended that the prisoner should take it up, and by mistake entered the amount in the prisoner's book. When the money was lying upon the counter the prisoner was aware that he was not entitled to it, and that it could not be, and was not really intended for him; yet with full

knowledge on his part of the mistake, he took the money up and carried it away, intending at the time he took it to deprive the owner of all property in it, and feloniously to appropriate it to his own use. There was, therefore, as it seems to us a wrongful and fraudulent taking and carrying away of the whole of this money by the prisoner, without any color of right, *animo furandi*, and against the will of the real owner. For these reasons, and upon the authorities stated, we think the prisoner was properly convicted of larceny.

Kelly, C. B. The facts of this case, simply stated, are these: The prisoner, having deposited 10s. in the Post-office Savings Bank, and taken the necessary steps to withdraw it, proceeded to the post-office and presented his order for the 10s. The post-office clerk, having looked at the letter of advice for the payment of the 10s., and at another letter of advice for the payment to another depositor, of £8 and a fraction, by mistake took up the £8 odd destined for the other depositor, and laid it upon the counter before the prisoner, who took up the money and went away with it, and applied it to his own use. The jury expressly found that he knew the £8 odd did not belong to him, and that it did belong to the Postmaster General, and that he took it up and carried it away with him *animo furandi*. Upon these facts, and this finding, I cannot bring myself to doubt that the prisoner was guilty of larceny. He saw the money upon the counter before him; he knew that it was not his own, and that it was another person's money, and he took it up and took it away with the intent to steal it. If he had gone into the office knowing that he had to receive 10s., and that somebody had to receive £8, and he had seen the 10s. and the £8 lying upon the counter before him, and had taken away the £8 *animo furandi*, no question could have been raised about his guilt. Does it then make any difference that the clerk placed the money before him and intended that he should take it? If the money had belonged to the clerk, and the clerk had intended to pass the property in the money from himself to the prisoner, or if, the money belonging to the Postmaster General or the Queen, the clerk had been authorized to pass the property *in that money* to the prisoner, the

case might have been different. But this money did not belong to the clerk, and he had no authority to pass the property *in the money* to the prisoner. R. v. Prince was cited, where a banker's clerk, to whom a forged check was presented, paid the money in ignorance of the forgery and the receiver, who intended to defraud the banker of the money, was acquitted of larceny on the ground that the clerk had the authority to receive the check and to dispose of the money which he had paid to the prisoner, and was the agent of the banker in so doing; so that the case was the same as if the banker himself, who was the owner of the money, had delivered it to the prisoner. There, however, the clerk was not only the agent of the banker, but he acted strictly in the discharge of his duty, for he had not only the authority of his employer to pay the money, but in the absence of any suspicion, or reason to suspect, that the check was forged, it was his duty to pay it, and he did pay it with the banker's money. And there are other cases where the owner of a chattel delivered it to another with the intent to pass the property, and the receiver has been acquitted of larceny. But in this case the post-office clerk was not the owner of £8, and had no authority whatever to deliver that sum of money to the prisoner, which is precisely the case excepted in the judgment of the Queen v. Prince, and brings it within the Queen v. Longstreet therein cited. The case appears to me to be the same (indeed I suggested it during the argument) as if the prisoner had left a watch at a watchmaker's to be repaired, and afterwards goes to the watch maker's, where he sees his watch hanging up behind the counter and another watch of greater value, and belonging to another person, hanging beside it, and upon his asking for his watch, the shopman, by mistake, hands him the watch belonging to the other person. He sees his own watch; he knows that the watch handed to him does not belong to him, but is the property of another, and that the shopman has no authority whatever to deliver the watch of another to him. I have no doubt, therefore, that one who had so received and taken away another man's property would have been guilty of larceny, and that the shopman in such a case, and the clerk in this case, is in the condition of a mere bystander, who, without authority

and by mere mistake, hands to him a chattel which he sees before him. Even *Prince's case* may be said to be founded on a fiction, for it is not true that the banker had authorized his clerk to pay his money upon a forged check; but the fiction is more undisguised and palpable when it is asserted that the clerk was authorized by the Postmaster General to pay the sum of £8 to a man who had presented an order or warrant for 10s. And I must beg leave to record my deliberate opinion that the creating of fictions, which, as the term imports, is the assuming to be true that which is untrue, and of which the direct consequence is to defeat justice, is a practice which, in administering the law, ought not to be extended. Moreover, this case is distinguishable from Prince's case on the ground of the decision in Reg. v. Longstreet, where a carrier's servant delivered a parcel to one who received it *animo furandi;* knowing it not to be his own, and it was held that he had no authority to deal with the property in the goods, but only with the possession, and that the receiver was guilty of larceny. I think that decision governs the present case, and conclusively shows that if a servant delivers to the wrong person a chattel, which it was no part of his duty, and which he had no authority to deliver to any but the owner, and the receiver takes it, knowing it is not his, but belongs to another, and *animo furandi*, such receiver, although the delivery is made in the ordinary performance of the duty of the servant, is guilty of larceny. Upon these grounds I think the conviction should be affirmed.

Martin, B. I have read the judgments of my brothers, Bramwell, B., and Cleasby, B., and fully concur in them. I think that upon the facts and on the principles of the Criminal Law, there was no larceny committed in this case. In my judgment the case of Reg. v. Prince is not distinguishable from this case. There the prisoner committed a more gross offence, and yet the court held it not to be larceny. The true principle of larceny is to be found in Coke's 3d Instit. 107: "Larceny is the felonious and fraudulent taking and carrying away by any man or woman of the mere personal goods of another, neither from the person or by night in the house of

the owner." And, "Secondly, there must be an actual taking, for an indictment *quod felonice abduxit equum* is not good because it was *cepit;* by taking, and not bailment, or delivery, for that is a receipt, and not a taking; and therewith agreeth Glanvil." The cases collected in Russ. on Crimes show that there must be a taking, and it is essential to the crime of larceny that the act of taking should be a trespass. In my opinion, what the prisoner did was not taking in that sense, and not a trespass, but only a receipt. The civil remedy to recover back the money would have been trover and not trespass.

BRAMWELL, B. As the prisoner has now undergone his nominal sentence, I should think it better that the small minority in this case, of whom I am one, should give up their opinions to the majority, if the case turned on its own particular circumstances, and no principle was involved. But in my opinion, great and important principles, not only of our law, but of general jurisprudence, arise here, on which I feel bound to state my views. It is a good rule in criminal jurisprudence not to multiply crime; to make as few matters as possible the subject of criminal law; and to trust, as much as can be, to the operation of the civil law for the prevention and remedy of wrong. It is also a good rule not to make that a crime which is the act of, or partly the act of, the party complaining *volenti non fit injuria*—as far as he is willing let it be no crime. Here the taking was consented to. This is undoubtedly a rule of the English Common Law. Ordinary cheating was not. Embezzlement by a servant was not larceny. Breaches of trust by trustees and bailees were not; so, also, fraudulently simulating the husband of a married woman, and having connection with her was not. And most particularly was and is this the case in larceny, for the definition of it is that the taking must be "*invito domine.*" Whether the law is good or bad is not the question. We are to administer it as it is. I think those statutes that have made offences of such matters as I have mentioned improved the law, because the business of life cannot be carried on without trusting to representations that we cannot verify, and

without trusting goods to others in such a way that the owner loses all power of watching over them; and it is reasonable that the law should protect persons who do so, by making criminals of those who abuse that confidence.

But something was to be said in favor of the old law, viz.: that the opportunity for the crime was afforded by the complainant. Further, there is certainly a difference between the privy taking of property without the knowledge of the owner, or its forcible taking, and its taking with consent by means of a fraud. The latter, perhaps, may properly be made a crime, but it is a different crime from the other taking. I say, then, that on the principle of general jurisprudence, on the general principle of our law, and on the particular definition of larceny, the taking must be *invito domino*. That does not mean contrary to or against his will, but without it—all he need be is *invitus*. This accounts for how it is that a finder of a chattel may be guilty of larceny. The *dominus* is *invitus*. So in the case of a servant who steals his master's property. There are certain cases apparently inconsistant with this, but which are brought within the rule, but by reasoning which ought to have no place in criminal law. I mean such cases as where a carrier broke bulk and stole the contents or part, and was guilty of larceny, but would not have been had he taken the whole package; and cases where possession was fraudulently obtained *animo furandi* from the owner, who did not intend to part with the property. In such cases it has been held that the breach of trust by the carrier in breaking bulk revested the possession in the owner; and in the other case, the obtaining of possession was a fraud and so null, and that, therefore, in such cases the possession reverted to or remained in the true owner, and so there was a taking *invito domino*. So, also, cases where the custody is given to the alleged thief, but not possession or property, as where the price of a chattel delivered is to be paid ready money, R. v. Choen, 2 Den. 249. There are no exceptions to the rule, but are brought within it by artificial, technical, and unreal reasoning. But where the *dominus* has voluntarily parted with the possession, *intending to part with the property* in the chattel, it has never yet been held that larceny was com-

mitted, whatever fraud may have been used to induce him to do so, nor whatever may be the mistake he committed; because in such case the *dominus* is not *invitus*. So, also, where the possession has been parted with in such way as to give the bailee a special property. See 2 Russell on Crimes, 191, citing 2 East P. C. 682; Reg. v. Smith, R. & M. C. C. R. 473; R. v. Goodbody, 8 C. & P. 655. It is not necessary that the property shall pass; the intent to pass it is enough. See R. Coleman, 2 East, P. C. 672; 2 Russell, 200. It is clear that the property did not pass in that case, even voidably; not to the prissner, because the prosecutor's contract was not with him; nor to Mrs. Cook, for it was not with her. The same remark applies to Adams' case, 2 Russell, 200; see, also, Atkinson's case, 2 Russell, 207. The principle of the case seems misunderstood in the text. It is cited as a case where the property passed, but it is clear no property passed to any one. It is argued that here there was no intent to part with the property, because the post-office clerk never intended to give to Middleton what did not belong to him. A fallacy is involved in this way of stating the matter. No doubt the clerk did not intend to do any act of the sort described, and give to Middleton what did not belong to him. Yet he intended to do the act he did. What he did, he did not do involuntary, nor accidentally, but on purpose. See what would follow from such reasoning. A. intended to kill B.; mistaking C. for B. he shoots at C. and kills him. According to the argument he is not guilty of intentional murder; not of B., for he has not killed him; nor of C., for he did not intend to kill him. There is authority of a very cogent kind against this argument. A man, in the dark, gets into bed to a woman, who, erroneously believing him to be her husband, lets him have connection with her. This is not rape, because it is not without her consent; yet she did not intend that a man not her husband should have connection with her. I have noticed the above as another illustration of how the common law refuses to punish an act committed with the consent of the complainant. To proceed with the present matter: If the reasoning as to not intending to give this money is correct, then, as it is certain that the post-office clerk did not intend to give Middleton

10s., it follows that he intended to give him nothing. That cannot be. In truth, he intended to give him what he gave, because he made the mistake. This matter may be tested in this way: A. tells B. he has ordered a wine merchant to give B. a dozen of wine. B. goes to the wine merchant, *bona fide* receives and drinks a dozen of wine. After it is consumed the wine merchant discovers he gave B. the wrong dozen, and demands it of B., who having consumed it, cannot return it. It is clear the wine merchant can maintain no action against B., as B. could plead the wine merchant's leave and license. But it is said that if B. knew of the mistake, and took the wine *animo furandi*, then he would have taken it *invito dominus*. So that whether the *dominus* is *invitus* or not depends, not on the state of his own mind, but on that of B. It is impossible to say that there was a taking here sufficient to constitute larceny, because the money was picked up; but if it had been put in the prisoner's hand, there was no such a taking. But for the point, then, I am about to mention, I submit the *dominus* was *invitus*, that he consented to the taking, and that it was partly his act. No doubt the prisoner was a dishonest man—may be what he did ought to be made criminal—but his act was different from a privy or forcible taking; he was led into temptation, the prosecutor had very much himself to blame, and I certainly think that Middleton, if punished, should be so on different considerations from those which should govern the punishment of a larcenous thief. But a point is made for the prosecution on which I confess I have the greatest doubt. It is said that here the *dominus* was *vitus*—that the *dominus* was not the post-office clerk, but the Postmaster General, or the Queen, and that therefore it was an unauthorized act in the post-office clerk, and so trespass in Middleton *invito domino*. I think one answer to this is that the post-office clerk had authority to decide under what circumstances he would part with the money with which he was intrusted. But I also think that, for the purpose of this question, the lawful possessor of the chattel, having authority to transfer the property, must be considered as the *dominus*, at least when acting *bona fide*. It is unreasonable that a man should be a thief or not, not according to his act or intention, but according to a matter which has

nothing to do with them, and of which he has no knowledge. According to this, if I give a cabman a sovereign for a shilling by mistake, he taking it *animo furandi*, it is no larceny; but if I tell my servant to take a shilling out of my purse and he by mistake takes a sovereign and gives it to the cabman, who takes it *animo furandi*, the cabman is a thief. It is ludicrous to say that if a man, instead of himself paying, tells his wife to do so, and she gives the sovereign for a shilling, that the cabman is guilty of larceny, but not if the man gives it. It is said that there is no great harm in that a thief in mind and act has blundered into a crime. I cannot agree. I think the Criminal Law ought to be reasonable and intelligible. Certainly a man who had to be hung owing to this distinction might well complain; and it is to be remembered that we must hold that to be law now which would have been law when such a felony was capital. Besides, jurors are not infallible, and may make a mistake as to the *animo furandi*, and so find a man guilty of larceny when there was no theft and no *animus furandi*. Moreover, Prince's case is contrary to this argument, for there the bankers' clerks had no authority to pay a forged check if they knew it. They had authority to make a mistake and so had the post-office clerk. And suppose in this case the taking had been *bona fide*. Suppose Middleton could neither write nor read, and some one had made him a present of the book without telling him the amount, and he had thought the right sum had been given to him, would his taking of it have been a trespass? I think not, and that a demand would have been necessary before an action of conversion could be maintained. No doubt the cases on this point are difficult, but I think not inconsistent with this opinion. In Longstreet's case, 3 Russ., 203, the servant had no authority to *change property* in the thing delivered. So in Wilkins's case, 3 Russ., 211. In Small's case, Ib., 213, the servant had authority to part with the possession only if he got a good half-crown, and the prisoner knew that. So in Stewart's case, 1 Cox C. C., 174, where the reasoning of Alderson, B., is very important. In Shepherd's case, 9 C. & P., 121, the servant had no authority to sell the mare, and the prisoner, his confederate, knew the mare was not the property of the servant. So in Hench's case, 2

Russ., 215, the servant had no authority to pass the property. As to Pearce's case, 2 East P. C., 603, there was no intent to pass the property. As to R. v. Kay, 2 Russ., 217, the reasoning by which the conviction is justified is, I repeat, such as ought not to exist in any law, most especially not in the Criminal Law. But, as it is said in the note to that case, there was no intention to part with the property. On these grounds I think the conviction was wrong. I need not profess my respect for those whose opinions are the contrary, but I feel bound, as I have said, to express mine, because I think very important principles are involved, and because I think it desirable to show that those whose opinions I share may be (and probably are) in the wrong, considering the numerous and weighty reasons the other way. There is more doubt in the case than has appeared to some who seem to me to reason thus. The prisoner was as bad as a thief (which I deny); and being as bad ought to be treated as one (which I deny also.) To such reasoners I give the recommendation contained in an excellent article in the Law Times of Jan. 25, 1873, p. 228, where it is said: "A Metropolitan County Court Judge might, with advantage, read and inwardly digest Paley's Moral and Political Philosophy, or some approved treatise, in which the necessity for positive rules of general application, the doctrines of particular and 'general consequences,' and the superior importance of and regard due to 'general consequences,' are really expounded."

Pigott, B. I agree in the judgment of the majority of the court, except that I do not adopt the reasons which are there assigned for holding that the mistaken intention of the clerk did not under the circumstances here prevent the case from being one of larceny on the part of the prisoner. I quite accede to that proposition, but my reason is that, in the view I take of the facts, the intention and acts of the clerk are not material in determining the nature of the prisoner's act and intent; because the transaction between them stopped short of placing the money completely in the prisoner's possession, and could in no way have misled the prisoner. The case states, the clerk placed the money on the counter. He then entered

the amount of it in the prisoner's book and stamped it. This no doubt gave the prisoner the opportunity of taking up the money, and he did so in the presence of the clerk; but before doing so he must have seen by the amount that the clerk was in error, and that the money could not really be intended in payment of his order, and therefore was not for him, but for another person. It was with full knowledge of this mistake that he resolved to avail himself of it, and, in fact, to steal the money. The interval afforded him the opportunity, and he did in fact conceive the *animus furandi*, while as yet he had not taken the money in his manual possession. The dividing line may appear to be a fine one; but it is, I think, very distinct and well defined in fact, for it is with this formed intention in his mind that he took possession of the money. If complete possession had been given by the clerk to the prisoner, so that no act of the latter was required to complete it after his discovery of the mistake and his own formed intention to steal it, I should not feel myself at liberty to affirm this conviction. In that case the prisoner would have done nothing to defraud the clerk, and the latter intending (to the extent to which he had such intention) as much to pass the property as the possession in the money, there would be nothing to deprive the matter of the character of a business transaction fully completed. I desire to adhere to the law stated in the 3d Institute, p. 110: "The intent to steal must be when it cometh to his hands or possession; for if he hath the possession of it once lawfully, though he hath *animus furandi* afterwards and carrieth it away, it is no larceny." But the facts satisfy me, and the jury have found upon them, that the prisoner had the *animus furandi* while the money was yet on the counter, and that at the moment of taking it up, he knew the money to be the Postmaster General's. The case is therefore very much like that of a finder, who immediately on finding it knows, or has the means of knowing the owner, and yet determines to steal it: 2 Russell, 169. The same facts satisfy the requirements in the definition of larceny, that the taking must be *invito domino*. The loser does not intend to be robbed of his property, nor did the clerk in this case; and the prisoner's conduct is unaffected

by the clerk's apparent consent, in ignorance of its real nature. I therefore agree in affirming the conviction.

BRETT, J. This case has been considered in three different ways. It has been said that a proper inference of facts to be drawn from the facts stated is, that the prisoner took and carried away the money without any consent to his so doing by the clerk, who was present, and that in such case the same rule of law is applicable as would be if the prisoner had taken and carried away the money in the absence of the clerk, and that the prisoner was therefore properly convicted. It has been said that the facts which are stated show that, as a matter of fact, the clerk in this case had no general authority to part with the property in the money intrusted to him on behalf of the Postmaster General, but only a limited authority to part with a particular sum of money to the prisoner, which was not the sum of money he did part with, or to hand a sum similar to that which he in fact handed to the prisoner, to some one else and not to the prisoner, and that consequently the prisoner was by law properly convicted of larceny, even though the clerk intended the prisoner to take and keep the money, or in other words, even though the clerk intended to part with both the possession and the property in the money. It has been said that, even though the clerk had a general authority to part with the possession of any property in the money, an authority equal to that of the Postmaster General, if he had been present, and even though the clerk intended to part with the possession of and property in the money, yet that the prisoner was properly convicted, because no property in the money did in point of law at any time pass to the prisoner. Any difference of opinion as to the first proposition, can only rise upon a difference of view as to the proper inference of fact to be drawn. And I think also that the only difference of opinion with regard to the second proposition is a difference as to the true interpretation of the clerk's authority as matter of fact. But the difference as to the last proposition is a difference as to the Criminal Law. The difference of opinion that has arisen upon the proposition makes it necessary, as it seems to me, to refer to the definition of larceny, and to point out the exact part of

that definition which is in question. The definitions which have been generally, and till now I think universally, accepted are, that "larceny consists in the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property without the consent of the owner," and again, "the felonious taking the property of another without his consent and against his will, with intent to convert it to the use of the taker." The indictment for larceny is invariably founded upon these definitions, and comprises by necessary inference, if not in express terms, every part of them. It has always been held that each allegation of each part of these definitions is a material allegation in the indictment, and that every one of such allegations must be proved. Where criminal law is so accurately and so mercifully administered as it is in England, and with so firm a determination that no man shall be convicted of crime unless the prosecutor can prove that the case is brought in every particular within the recognized or enacted definition of the crime, it was to be expected that there would be, and it is the fact that there have been, critical decisions on every part of the definition of the crime of larceny. To some people such decisions appear to be subtle; to others carefully and rightfully accurate. One part of the definition is that the taking relied upon as the stealing should be a taking "without the consent and against the will of the owner." That is the part of the definition which is in question in this case. It has always been held to be a necessary part of the definition. "Besides the *animus furandi* it is necessary that the taking of the goods should also be without the consent of the owner," "*invito domino*," 2 Rus. Crimes, 189, (4th ed). This is of the very essence of the crime of larceny, as well as essential in robbery. The cases quoted are: as to robbery, Reg. v. McDaniel, Fost, 122, and as to larceny, Reg. v. Egginton, 2 Leach, 913. Where the taking which is alleged to be felonious has occurred without the knowledge of the owner or of the person in charge, no difficulty can arise upon this part of the definition. The difficulties which have arisen have been where the goods have been delivered to the prisoner or have been

taken by the prisoner with the consent of the owner, or of the person in charge. In such cases a distinction has been made between the terms "delivery," "possession," and "property." Where the goods are obtained by the prisoner by willing delivery of them to him by the owner, the first proposition of law which has been affirmed is as follows: "If it appear that, although there is a delivery by the owner in fact, yet there is clearly no change of property, nor of legal possession, but the legal possession still remains exclusively in the owner, larceny may be committed exactly as if no such delivery had been made. Thus, if a person to whom goods are delivered has only the bare charge or custody of them, and the legal possession remains in the owner, such person may commit larceny by a fraudulent conversion of the goods to his own use."

The next received proposition is thus stated: "Where there is a delivery of the goods by the owner, it is a settled and well established principle, that if the owner parts with the property in the goods taken, there can be no felony in the taking, however fraudulent the means by which such delivery was procured." And, according to the common law, if the owner had not parted with the property in the goods, but only with the possession of them, the question of larceny remains open, and depends on the fact whether at the time of the alleged felonious taking the owner parted with the possession of the goods in such a manner and to such an extent as to exclude the idea of trespass. If the possession be obtained by fraud, there may be larceny, assuming that the other parts of the definition are fulfilled. If the possession be obtained without fraud, the taking by which the possession is obtained cannot be treated as a taking by trespass, and, consequently, not as a taking without the consent of the owner. The proposition thus expressed leave open a question as to whether they mean that the property in the goods has passed in consideration of the law, or whether they mean that "it was the intention of the owner that the property should pass." Now they are addressed to the question whether the thing alleged to have been stolen was taken "without the consent of the owner." Consent or non-consent is an action of the mind; it consists exclusively of the intent of the mind. These propositions,

therefore, are treating of a question of intention. If it be said that a man intended to part with the property in a thing which he delivers to another, meaning of the words is, that he intended that the other should take the thing and keep it as his own. It seems a contradiction in sense to say that the thing so delivered is taken from him "without his consent." It seems to follow that the real meaning of the proposition, when they speak of the owner parting with possession or parting with the property, is as if they were written: "If the owner intended to part with the possession, or intend to part with the property." All the cases are consistent with this view, though it is not expressed in terms in all. In Reg. v. Harvey, 9 C. & P., 353, ALDERSON, B., asked the jury whether the prosecutor meant that the prisoner should leave the jug with the lady, and either bring back the money or make a bargain. In Reg. v. Johnson, 5 Cox C. C., 372, the jury found, under direction that the prosecutor did not intend to part with the property in the cheque. In Parke's case, 2 East, P. C., 671, the question left was, whether there was a sale by Mr. Wilson, and a delivery of the goods with intent to pass the property. The jury found that Mr. Wilson did not intend to give credit. The conviction was indeed set aside, but on the ground, as I apprehend, that there was no evidence to justify the finding of the jury. In Rex v. Nicholson, 2 East, P. C., p. 669, the conviction was held to be wrong by the judges, on a case reserved, on the ground that the property in the post bill and cash was parted with by the prosecutor under the idea that it had been fairly won. The ground of the judgment seems to me to be the intention or idea of the prosecutor. In the case of R. v. Adams, it seems to me impossible to say that any property in the hat passed to the prisoner in consideration of law. The hat was delivered by the owner to an innocent messenger or the prisoner upon an assertion that he, the messenger, was sent by Paul. No property passed to Paul, because there was no delivery to him or to any agent of his. No property passed in law to the prisoner, because there was no intention that he should have the hat. But the act of taking relied on was the delivery of the hat by the prosecutor to the messenger, and the prosecutor intended to part with the

property in the hat, or in other words, that it should be taken away and kept. The judges, on a case reserved, held that there could be no felony. The decision in the cases of Rex v. Davenport and Rex v. Savage seem to me to be founded entirely on discussions and considerations as to the intention of the prosecutor to pass the property. In Atkinson's case, 2 East P. C., 673, the decision of the judges upon a case reserved is in terms, that there was no felony, as it appeared that the property was intended to pass by the delivery of the owner. In the last case upon this point, the case of R. v. Prince, 11 Cox C. C., 193, the proposition of law is thus stated by Blackburn, J.: "If the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority co-equal with the master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intends to part with the property in it." The question has always been a question left to the jury, and has never hitherto been treated as a difficult question of the law of property to be ruled by the judges. There is no trace in the books of the treatment now sought to be applied. The preamble to the statute, 33 Hen. 8, c. 1, draws the distinction between goods taken "by stealth" and goods "delivered by the owner willingly, on being deceived by false token." On consideration, then, of the authorities, and of the part of the definitions with which they dealt, and of principle, I am of opinion that the proposition of law which would have been applicable in this case if the owner himself had been present is, when accurately stated, that "where there is a delivery of the goods by the owner, there can be no felony if the owner intend to part with the property in the goods, however fraudulent the means by which such delivery was procured." Where the delivery is made by a servant or agent of the owner, and the servant or agent have an authority to pass the possession of and the property in the goods as if the owner were present, the same rule is applicable as if the delivery had been made by the master. R. v. Jackson and Reg. v. Prince. But if the delivery be by a servant or agent whose authority is limited, in-

tending only to pass the possession and not to pass the property, then the proposition applicable is that which applies when the master delivers only the possession, and not the property. Although the servant delivers the goods, intending to pass both possession and property, the prisoner may be convicted of larceny, if he obtain the delivery by fraud, R. v. Longstreet, 1 Moo., C. C., 137, and many other cases; just as if by fraud he obtained delivery from the owner who intended by such delivery to give possession only, and not to pass the property. Such I believe to be the propositions of law which have been acted upon by a long series of most able and careful judges, and which, therefore, the present judges, in my opinion, have no authority to overrule. It follows that I cannot agree with a judgment which decides that, even though the clerk had a general authority to part with the possession of and property in the money, an authority equal to that of the Postmaster General, if he had been present, and even though the clerk intended to part with the possession of and property in the money, yet that the prisoner was properly convicted. I think that such a judgment is founded upon and enunciates a wrong proposition of law. Upon the assumption of facts thus stated, I am of opinion that a prisoner could not be convicted according to law of larceny. But if the clerk had only a limited special authority to part with only the possession of the money intrusted to him, or a limited special authority to part with the property in a different sum from that which he delivered to the prisoner, or a limited special authority to part with a similar sum to that which he delivered to the prisoner, not to the prisoner, but to another person, then I am of opinion that the prisoner, upon the assumption that the other parts of the definition of larceny were proved, was properly convicted of taking the money without the consent of the Postmaster General, and properly convicted of larceny. This reduces the difference of opinion as to the first proposition which has been stated in this case to a difference of opinion as to what was the intention of the clerk with regard to delivering the money; and, for the second proposition as to what was the authority in fact of the clerk. It seems to me that, with regard to passing the possession of any property in the money intrusted to him, he had

the same authority as any other bank clerk. If he acted with strict accuracy, his duty was to part with so much money as he was directed to part with by a genuine warrant, and to pay such sum of money to the person mentioned in such warrant. But he had authority to part, not with any specific money, but with any of the money intrusted to him, to any one of all the persons who should properly present a genuine warrant. That seems to me to be a general authority. To all such persons he had authority to give possession of the money, in order that they might keep it; that is to say, he had authority to pass to all such persons the possession of and property in the money which he handed to them. It seems to me, therefore, that as to passing the possession of and property in the money which he should deliver, he had a general authority to deal with the money as if in place of the owner. It seems to me that the clerk intended to pass to the man who stood before him, that is to say, the prisoner, the possession of and the property in the whole of the money which he laid on the counter for the prisoner to take up, and entered into the prisoner's book as paid to the prisoner; and it seems to me to follow that the prisoner, notwithstanding his fraudulent knowledge of the clerk's mistake, and his fraudulent reticence, and his fraudulent acceptance of what he knew was not due to him, cannot legally be convicted of larceny. I think that the conviction was wrong.

Cleasby, B. The case is not affected by the acts of parliament extending the criminal responsibility for larceny to bailees and others, because the prisoner was clearly not a bailee so as to be guilty by subsequently converting the money to his own use, and he does not come within any other act of parliament. We have, therefore, to deal with a case in which a crime is charged which under the old law would have been punishable with death, and in early times generally received that punishment. The punishment was so severe that the crime was strictly defined, and from the earliest times was not committed by fraudulently dealing with or appropriating the property of anothers, but was only committed when the property was taken by the accused; and it must be taken fraudu-

lently without the consent of the owner. It is laid down in Foster's Crown Law, p. 123. "It is of the essence of the offence of robbery and larceny that the goods be taken against the will of the owner." Lord Cook, in the 3d Institute, under the head of larceny or theft, p. 107, quotes the definition in the Mirror of Justice to the above effect, and he then gives the explanation of the words in the Mirror as follows, quoting from the translation. "It is said a taking for bailing or delivery is not in this case." And Lord Coke himself says afterwards, p. 107: "Secondly, it must be an actual taking; by taking and not bailment or delivering, for that is a receipt and not a taking; and therewith agreeth Glanvil, "*Furtum non est ubi initium habet detentionis per dominum rei.*" This continues the law except so far as altered by statute. But the taking does not necessarily mean a taking by force or surreptitiously; and the cases as to what constitutes a taking occupy nearly one hundred pages in Russell on Crimes, vol. ii. p. 152, 4th edit. They seem to establish: first, that where delivery is fraudulently obtained from any person having no authority to deal with the property, it is a taking from the owner. The instances of this are obtaining delivery from a mere servant by a false representation of the master's orders; obtaining delivery from a carrier whose only authority it is to change the possession from A to B by a false representation of being B. Another instance more like the present, because there is a mistake, is where a person leaves his umbrella or cloak with any person, to be returned on application, and he afterwards fraudulently identifies as his own a more valuable umbrella or cloak belonging to another person. This would be a taking, because the parties had no transaction or dealing connected with property, the person in charge having only an authority to return to each person his chattel.

Secondly, the cases established that when the owner himself delivers them, but only for the purpose of some office or custody, as of a man delivering sheep to his shepherd (an instance put by Coke), if the shepherd had them in his charge, and fraudulently converted them to his own use, it would be a taking, because the right of possession (much less of property) was not for an instant changed. But the case also established

that where there is a complete dealing or transaction between the parties, for the purpose of passing the property, and so the possession is parted with, there is no taking, and the case is out of the catagory of larceny. Considering what the penalty was, there was nothing unreasonable or contrary to the spirit of our law in drawing a dividing line, and holding that whenever the owner of property is a party to such a transaction as I have mentioned, such serious consequences were not to depend upon the conclusion which might be arrived at as to the precise terms of the transaction, which might be complicated and uncertain and difficult to ascertain. And this agrees with Hawkin's opinion, Pleas of the Crown, Book 1, c. 33, sect. 3, where in dealing with the question of what shall be a felonious taking, after pointing out that unless there has been a trespass in taking goods, there can be no felony in carrying them away, he adds: "And herein our law differs from the civil, which having no capital punishment for bare theft, deals with offences of this kind (that is fraudulent appropriations of things not taken) as in strict justice most certainly it may; but our law, which punishes all theft with death if the thing stolen be above the value of twelve pence, and with corporal punishment if under, rather choses to deal with them as civil than criminal offences." I believe the rule is as I have stated, and that it is not limited to cases in which the property in the chattel actually passed by virtue of the transaction. I have not seen that limitation put upon it in any text-book on the criminal law, and there are, unless I am mistaken, many authorities against it. The cases show no doubt beyond question that where the transaction is of such a nature that the property in the chattel actually passes (though subject to be resumed by reason of fraud or trick), there is no taking, and therefore no larceny. But they do not show the converse, viz., that when the property does not pass there is larceny. On the contrary, they appear to me to show that where there is an intention to part with the property along with the possession, though the fraud is of such a nature as to prevent that intention from operating, there is still no larceny. This seems so clearly to follow from the cardinal rule that there must be a taking against the will of the owner, that the cases rather assume that the intention to

transfer the property governs the cases than expressly decide it. For how can there be a taking against the will of the owner when the owner hands over the possession, intending by doing so to part with the entire property? As far as my own experience goes, many of the cases of false pretences which I have tried have been cases in which the prisoner has obtained goods from a tradesman upon the false pretence that he came with the order from a customer. In these cases no property passes either to the customer or to the prisoner, and I never heard such a case put forward as a case of larceny. And the authorities are distinct upon cases reserved for the judges that in such cases there is no larceny. In Reg. v. Adams, 1 Den. C. C., 38, the prisoner was indicted for stealing a quantity of bacon and hams, and it appeared that he went to the shop of one Aston, and said he came from Mr. Parker for some hams and bacon, and produced the following note, purporting to be signed by Parker. "Have the goodness to give the bearer ten good thick sides of bacon and four good hams at the lowest price. I shall be in town on Thursday next, and will call and pay you. Yours respectfully, T. PARKER." Aston, believing the note to be the genuine note of Parker, (who occasionally dealt with him), delivered the articles to Adams. The jury convicted, but upon a case reserved, upon the question whether the offence was larceny, the judges were all of opinion that the conviction was wrong. Coleman's case, 2 East P. C., c. 16, s. 104, p. 672, is to the same effect. In that case the prisoner got some silver as change, falsely pretending to come from a neighbor for it; and it was held not to be a case of larceny. Atkinson's case was a similar one and the prisoner was convicted, but on a reference to the judges, after conviction, all present held that it was no felony, on the ground that the property was intended to pass by the delivery of the owner. 2 East, c. 16, s. 104, p. 673. There is also a large class of cases in which it has been held that there was no taking, so as to constitute larceny, where the possession had been wholly parted with (not by way of mere charge or custody, as in the case of the shepherd or butler), though there was no intention to pass the property. And the distinction has been drawn between delivering yarn to a weaver to work up on the employer's prem-

ises, in which there is no complete parting with the possession, and the delivering to a weaver to take home and work up there. In the latter case the possession is wholly parted with, and previous to recent legislation there could be no larceny by subsequent appropriation, 2 East P. C., c. 16, s. 109, so the giving cloth to a tailor to make into a coat.

In like manner delivering a horse to be agisted at so much a week, R. v. Smith, 1 Moody, C. C. R., 473, or cattle to a drover, to be sold on the road, if he could do so, R. v. Goodbody, 8 C. & P., 665. In all these cases, the legal possession being wholly transferred, there could be no taking in the nature of a trespass, and they were not formerly cases of larceny. I will only further refer to the case of R. v. Barnes, 5 Cox, C. C. 112, and I do so from its resemblance to the present case. The prisoner was indicted for larceny. He was clerk to the prosecutors, and it was his duty to pay dock and town dues. He fraudulently represented that a sum of £3 10s. 4d. was required to make the payments, when only £1 3s. was wanted, and obtained the larger sum, intending to appropriate the difference to his own use. Upon a case reserved it was held not to be larceny. The main difference between the case and the present is, that the prisoner there dishonestly made use of falsehood to obtain the larger amount; in the present case he obtained the larger amount by dishonestly omitting to correct the mistake of the postmistress. In both cases the over-payment was made under a mistake of the facts. In my opinion, all the authorities warrant the proposition of law as laid down by my brother Blackburn, in the last reported case on the subject, Reg. v. Prince, 11 Cox, C. C. 193, which was, like the present, a case of payment under a mistake of fact. "If the owner intended the property to pass, though he would not have so intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority co-equal with the master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intended to part with the property in it." With these authorities before me, I cannot accept as the proper test, not the intention of the owner to

deliver over the property, which is a question of fact, but the effect of the transaction in passing the property, which might raise in many cases a question of law. This appears to be a novelty, at variance with the definition of larceny, which makes the mind and intent of the owner the test, and irreconcilable with the manner in which these cases have always been dealt with. And it is of great importance to abide by cases already decided by the judges, because the law of larceny being the same in Ireland as in England, the decisions ought to be the same; and the judges in Ireland may feel themselves bound by adjudged cases, recognized in all the text-books, and long acted upon, though all may assume to overrule them, and so they may be an undesirable divergence of opinion. And it must be borne in mind that the cases which must be overruled, if this new test be adopted, (Adams's case, Coleman's case, Atkinson's case), are not decisions of the Court for Crown Cases Reserved, but unanimous decisions of all the judges upon cases submitted to them. However desirable it may be that the law should not be changed, I am not at liberty to set aside or qualify the rule of law so long settled, and to say that an acquisition of a chattel by dishonest means is now a felony. Nor do I feel myself at liberty to leave such a question to the jury. If the transaction is of the nature which I have mentioned, the dishonest mind of the person receiving is immaterial upon the charge of felony and ought not, therefore, to be left to the jury, otherwise the jury would be misled by their disapproval of anything dishonest, into the erroneous conclusion of a felonious intent to do that which is not a felony. But the person with whom the transaction takes place, and from whom the delivery is received, must be a person qualified to enter into the transaction, and capable of passing the property. In the present case the transaction was with the clerk of the postmistress. The clerk was the person placed in the office for the purpose, *inter alia*, of making payments and taking receipts. He is called the clerk, and, therefore, his act within the general scope of his authority would be the act of the postmistress. But it is suggested that the postmistress was not in any sense the agent of the Postmaster General, but had in each case a separate and particular authority to make

the payment. And, upon looking into the act of parliament 24 & 25 Vict. C., 14, I should not be prepared to decide this case upon the ground that the postmistress had a general authority, or more than a particular one, to make the payment of ten shillings to the prisoner. And if at the time when the payment was made the postmistress or clerk had done some act wholly out of the authority, as, for instance payment to a stranger, I should feel a difficulty in saying it must be regarded as the act of a person capable of passing the property in such a transaction. But upon this it is not necessary to give a decided opinion, because the prisoner was the person to be paid the ten shillings, for which he applied under the order, and the authority was to pay to him that sum. The exercise of power in making too large a payment on behalf of the Postmaster General was therefore only excessive, and according to the ordinary rule in the exercise of powers, was valid so far as it was within the power, the excess being clearly separable. This is not the case of the postmistress being authorized to deliver one bag of money to one person, and another bag of money to another person. In that case the prisoner knowingly getting the wrong bag would get something to which he had no color of title. The authority here is to enter into an account with the prisoner by paying him a certain amount, and making a corresponding alteration in the balance, and this is done, the payment is made, and the corresponding alteration in the balance, but there is a mistake in the amount paid, and so in the balance, and it becomes really the ordinary case of over-payment by a banker's clerk by mistake. It appears to me quite impossible, with due attention to the facts, to regard the prisoner as a stranger intervening in a transaction between other parties. No other party was present or was named, and the prisoner entered and left the office in the same character, viz.: that of payee, though he left it as payee of a larger amount than he was entitled to, and carried with him the book, which was an unanswerable proof that he was payee, and was payee of the larger amount. The prisoner was therefore entitled to be paid the 10s. out of the money handed to him, and that being so, there is a technical objection to the conviction that there are no particular chattels or pieces of money

in respect of which the charge of larceny can be sustained. But, independent of this technical objection, the duty of the prisoner, if he had acted as he ought to have done, was to have taken 10s. out of the amount, and to have handed the rest to the clerk. He ought at the same time to have handed back his book, and had it corrected, because it charged him with the receipt of £8 odd; but his omission to do this does not, in my opinion, involve him in the charge of larceny. There was no mistake in the person, because the prisoner handed in his order and also his deposit book, and if the clerk had known him well, it would have made no difference. He would still have paid him the wrong amount, because the same cause would have operated, viz.: looking at the wrong order. There was no mistake in the amount—I mean it was not the case of the clerk handing him a hundred pound note when he intended to hand a five pound note, or unknowingly two notes instead of one. He intended paying the prisoner the particular sum; and it was a deliberate act, because he took the amount from a document, and completing the transaction by debiting the prisoner with that sum in his book; so that it was not like the case of a wrong sum being put down by mistake, and the prisoner snatching it up and running away with it for the purpose of preventing the mistake from being set right. The mistake was in the supposed amount of the prisoner's claim. The prisoner applied for 10s., and the clerk thought he was entitled to more, and paid him accordingly, and this over-payment might have been afterwards adopted by the postmistress, so as to make the prisoner chargeable with the balance. The clerk did not the less intend to make the payment which he deliberately made, because he was at the time under the influence of a mistake. He would not have intended to make the payment but for the mistake. Mistakes are constantly occurring, and few people can say that they have not acted under their influence, but their acts remain as acts done at the time, though their effects may be afterwards corrected. No doubt there was no intention to overpay the prisoner, that is, to produce the effect of over-payment; but the intention was to do the act of paying the larger sum because it was thought to be the proper one. This is the answer to

one argument addressed to us, viz., that the prisoner took up what was intended for another and not for him, and therefore there was a taking by him *invito domino*. The conclusion of law would be quite correct if it could be correctly said that the amount was intended for another. The clerk ought to have intended that amount for another, and would have done so if he had properly informed himself of the facts; but, unfortunately for the prisoner, the clerk did not properly inform himself of the fact, and therefore he intended the prisoner to receive the larger amount. The clerk intended A to receive what he ought to have intended B to receive; but it was not the less his intention that A should receive what he handed over to him. There was only one transaction, and only two parties to it, the clerk and the prisoner, and his fault was the work of an instant, and would to an ignorant and illiterate person be connected with some confusion of mind, though the disparity of amount in this case would make a person of any sense correct the mistake. I do not think a man ought to be exposed to a charge of felony upon a transaction of this description, which is altogether founded upon an unexpected blunder of the clerk. The prisoner was undoubtedly at the office for an honest purpose, and finds a larger sum of money than he demanded paid over to him and charged against him. A man may order and pay for certain goods, and by mistake a larger quantity than was paid for may be put in the package, and he may take them away, or he may pay in excess for that which is ordered and delivered. Is the prisoner receiving to be put in the peril of a conviction for felony, in all such cases, upon the conclusion which may be arrived at, as to whether he knew, or had the means of knowing; and had the *animus furandi?* I think not. I think such cases are out of the area of felony, and therefore the *animus furandi* is inapplicable and ought not to be left to the jury. And any conclusion founded upon the finding of the jury, upon a question which ought not to be left to them, must be erroneous, because the foundation is naught. I think the conviction was against law and ought to be quashed.

Conviction affirmed.

STATE v. HENNESSEY.

(23 Ohio St., 339.)

Larceny of several articles at the same time, the transaction being the same, the whole, although they belong to different owners, may be embraced in one count of the indictment, and charged as one offence.

The defendant was tried and convicted at the October Term, A. D. 1872, of the Court of Common Pleas of Lucas county, for the crime of larceny. The second count of the indictment charged the defendant with feloniously stealing certain articles, the property of Lucinda E. Bevins, and certain other articles, the property of Ebenezer Bevins, the value of the property belonging to each being stated.

A bill of exceptions was taken on behalf of the State, by which it appears that the prosecuting attorney, having proved the taking by the defendant of the articles charged to be the property of Ebenezer Bevins, offered evidence tending to prove the taking by the defendant of the property alleged to belong to Lucinda E. Bevins; and that it was stolen at the same time, and that the stealing thereof was one and the same transaction.

The defendant's counsel objected to the introduction of such testimony. The court sustained the objection, and directed the prosecution to confine the testimony to proof of the larceny of the property of either one of the two persons, as he might elect, but not of both.

To the above rulings exceptions were duly taken by the prosecutor. And the case is brought here to obtain the opinion of

this court upon the questions presented, in pursuance of section 158 of the Criminal Code.

Stone, J. The objection taken by defendant's attorney to the evidence offered on behalf of the State, and the ruling of the court thereon, proceed upon the concession that the goods charged in the second count of the indictment to have been stolen were all taken at the same time, and that the taking thereof, although they were the property of different persons, constituted, in fact, but one transaction. This the attorney for the state offered at the time to prove, and such was the legal effect of the allegations of the second count of the indictment, under which the testimony was offered. In sustaining the objection, and requiring the prosecutor to treat the charge of stealing the property of each alleged owner as being necessarily, in law, charges of separate and distinct offences, we think the court erred.

The particular ownership of the property which is the subject of a larceny does not fall within the definition, and is not of the essence of the crime. The gist of the offence consists in feloniously taking the property of another; and neither the legal nor the moral quality of the act is at all affected by the fact that the property stolen, instead of being owned by one, or by two or more jointly, is the several property of different persons. The particular ownership of the property is charged in the indictment, not to give character to the act of taking, but merely by way of description of the particular offence.

It is urged, in support of the ruling of the court below, that whatever might otherwise be the law upon this subject, the taking, in such case, of the property of each owner must, under our statute, be held to be a separate and distinct offence, for the reason that the accused, in case he is convicted, and the value of the property taken is found to be less than thirty-five dollars, may be required as a part of the sentence, "to make restitution to the party injured in two-fold the value of the property." This position finds some countenance in the remarks of Sedgwick, J., in Commonwealth v. Andrew, 2 Mass., 409. The question, however, did not arise in that case, and was not determined.

The argument rests upon the assumption that an order of restitution can be made in a particular case in favor of one party only, and hence the conclusion is reached that this provision of the statute can only be complied with by treating the larceny of the goods of each owner as necessarily a separate and distinct offence.

The assumption seems to us to be founded in a misconception of the nature of the prosecution and of the relation to it of the party injured. The prosecution is concluded in the name and by the authority of the state, and the paramount object is the punishment of the offender. The party injured may be incidentally benefited as the result of a conviction, but he is in no sense a party to the proceeding.

The only parties upon the record, and the only parties in fact, are the state upon the one side and the accused upon the other. When, therefore, the subject of a particular larceny is the property of different persons, and is found to be of the aggregate value of less than thirty-five dollars, we see no reason why the jury may not, properly, be required to return the value of the property belonging to each, as well as the aggregate value of the whole, or why, such return being made, orders of restitution in favor of the several owners may not be made conformably thereto.

Being of the opinion that the court below erred in the rulings complained of, we state the following as the rule of law, which, in our judgment, ought to govern similar cases which may now be pending or which may hereafter arise.

Where several articles of property are stolen at the same time, the transaction being the same, the whole, although they belong to different owners, may be embraced in one count of the indictment, and the taking thereof charged as one offence.

WILSON v. STATE.

(45 Texas, 77.)

LARCENY.—The stealing of different articles of property belonging to different persons, at the same time and place, so that the transaction is the same, is but one offence against the state, and the accused cannot be convicted on separate indictments, charging different parts of one transaction as a distinct offence. A conviction on one of the indictments will be a complete bar to the others.

REVES, Associate Justice. In this case there was no appearance for the appellant. The case was submitted for the state on the brief of the assistant attorney-general.

There were two indictments pending in the criminal court of Dallas City, against the appellant. In the first one, numbered on the docket of the criminal court 2,398, the defendant was charged with the theft of a gelding belonging to Granville Criner, charged in the indictment to have been taken from the possession of D. N. Harden, who, as averred, was holding the animal for the owner. The other indictment, numbered on the docket 2,399, and found at the same term of the court, charged the defendant with theft of a saddle, bridle and blanket, one pair of saddle-bags, one umbrella, three shirts, one pair pants, two pairs of drawers, belonging to D. N. Harden, and taken from his possession on the 10th day of July, 1874, being the same day the gelding was stolen from him.

It appears that the defendant was first put upon his trial on indictment number 2,399, charging him with stealing the saddle, bridle and blanket, etc., on which charge he was con-

victed by the jury, and his punishment assessed at a fine of one hundred dollars and one year's confinement in the county jail; and, by the judgment of the court, he was remanded to the custody of the sheriff until the fine and costs were paid, and for the further term of one year, according to the verdict of the jury.

On his trial for stealing the gelding, as charged in indictment number 2,398, the defendant pleaded the former conviction on indictment number 2,399, as a bar, and asked to be discharged from further prosecution, because the offence for which he had been tried and convicted was, in fact and in law, the same offence of which he then stood charged. Upon the motion of the district attorney the plea was stricken out by the court. The case being submitted to a jury, a verdict was returned assessing the punishment at fifteen year's confinement in the penitentiary. The motion for a new trial being overruled, the defendant has appealed. The court did not err in refusing to give the special charges asked by the defendant, being one of the grounds of the motion for a new trial.

The first charge asked by the defendant was to the effect that the state could only prove that Granville Criner, the owner, did not give his consent to defendant to take the gelding, by Criner himself, or by the confession of the defendant. The court instructed the jury "that the want of the owner's consent could be established by the evidence of the party from whom the property was taken, or the party who was the owner, or it may be established by facts and circumstances, provided such circumstances so proven are of such a nature as to exclude absolutely every reasonable presumption that the owner gave his consent to the taking."

The appellant has no just ground to complain of this charge. Lawrence v. The State, 4 Yerg., 145, Free v. The State, 13 Ind., 324.

The second charge refused was given substantially in the general charge, and the court was not required to repeat it.

The fourth ground of the motion for a new trial presents the material question in the case, to wit: Because the court erred in striking out defendant's plea of *autrefois convict.*

Wharton, in his work on American Criminal Law (vol. 1,

sec. 570), says: "Whenever the offences charged in the two indictments are capable of being legally identified as the same offence by averments, it is a question of fact for a jury to determine whether the averments be supported and the offences be the same. In such cases the replication ought to conclude to the country. But when the plea of *autrefois acquit* upon its face shows that the offences are legally distinct, and incapable of identification by averments, as they must be in all material points, the replication of *nul tiel* record may conclude with a verification. In the latter case the court, without the intervention of a jury, may decide the issue." The same rules apply to the plea of *autrefois convict.*

"The plea," says Bishop, "must set out the record of the former conviction or acquittal, including the caption and indictment, and allege that the two offences are the same, and that the defendant in the former is the same person who is the defendant in the latter:" 1 Bishop's Cr. Pro., Secs. 814, 816. "When there are special pleas upon which the jury are to find, they must say in their verdict that the matters alleged in such pleas are either true or untrue: Code Cr. Pro., Art. 3091, Paschal's Dig.

In the case of Davis v. The State, 42 Texas, 494, the court said: "It would certainly be more in harmony with our general practice to submit both issues, the plea of not guilty, and plea of former conviction to the jury, with directions to first consider the special plea; and if they found that to be true, to proceed no further than to return their verdict upon it. The rule to be deduced from the authorities is, that where the offences charged in different indictments are so diverse as not to admit of proof that they are the same, the court may decide the issue without submitting it to a jury.

In the case of Boggess v. The State, from McLennan county, decided at Austin, 43 Tex., 347, the action of the court sustaining exceptions to the plea was held to be correct.

In the case at bar we are not able to say that it necessarily appears by the record that the offences are incapable of identification. The plea alleges that they are the same, and that the defendant is the same person in both indictments. The theft, as alleged in both indictments, is charged to have been com-

mitted on the same day, and from the same person. In one case he was the owner of the property, and in the other he was in possession, and holding the same for the owner, according to the allegations of the indictment.

If we look to the evidence, on the trial, for the theft of the gelding, as may be done in considering the motion for a new trial, it will be seen that D. N. Harden, from whose possession the property was taken, testified that a new saddle, a pair of saddle-bags filled with clothing, a blanket, and an umbrella, strapped on the saddle, were on the horse at the time he was taken, being in part such articles as are described in the indictment. The saddle-bags may have contained the other articles mentioned in the indictment. The horse and the saddle and saddle-bags belonged to Granville Criner, leaving it to be inferred that the other articles belonged to the witness Harden, as averred in the indictment.

"To sustain this plea, *autrefois convict or acquit*, it is not sufficient simply to put in the former record; some evidence must be given that the offences charged in the former and present indictments are the same. This may be done by showing, by some person present at the former trial, what was the offence actually investigated there; and, if that is consistent with the charge in the second indictment, a presumptive case will thus be made out, which must be met by proof on the other side, of the diversity of the two offences;" 1 Bishop's Cr. Pro., sec. 816. Both of the pleas of former conviction, and not guilty, should have been submitted to the jury for their action, under the direction of the court, as indicated in the opinion.

As the case must be reversed for the error in striking out the plea of former conviction, it becomes necessary to inquire as to what effect shall be given to the plea if found to be true. On the supposition that the horse and saddle and saddle-bags belonged to Criner, and the other articles belonged to Harden, and that all were taken at same time and place, and from the possession of the same person, the question would be whether the taking in the supposed case would be distinct larcenies, or only one offence. The authorities are found to be conflicting on the question.

Wharton says: "Where a man simultaneously steals two

articles, *e. g.*, a horse and a saddle together—he may be convicted on seperate indictments for each offence." Sec. 565, referring to The State v. Thurston, 2 McM., South Carolina, 382. In this case the defendant was indicted for stealing cotton belonging to three different individuals, and was convicted in the three cases; and the conviction in one case was held to be no bar to the conviction in the two other.

The court said: "The stealing of the goods of different persons is always a distinct felony, or may, at least, be so treated by the solicitor, if in his discretion he thinks proper so to do." Wharton also refers to the case of The Commonwealth v. Andrews, 2 Mass., 409—an indictment for receiving stolen goods belonging to different persons.

These cases, and some others, citing English authority, sustain the doctrine contended for. The great weight of American authorities is believed to be the other way.

In The State v. Williams, 10 Humph., 101, a case for stealing a gelding, one saddle, one blanket, a bridle and martingale, the court said: "The crime is single. All the things are charged to have been taken at the same time, the same place, and to have been the property of the same individual. The crime being one, is indivisible; that is, the State could not maintain separate prosecutions against the prisoner for stealing the horse, for stealing the saddle, for stealing the blanket, for stealing the bridle, for stealing the martingale, for this would be to punish him five times for one offence; and yet this would be the consequence, if the position assumed in behalf of the prisoner were sustained."

Also, Lorton v. The State, 7 Mo. Rep., 55. Lorton was indicted by the grand jury of St. Louis county, for stealing the goods of Richard Curle, and, at the same time, was indicted for stealing the goods of John B. Gibson. The defendant pleaded guilty to the first indictment, and, to the second, pleaded a former conviction for the same offence. The prisoner had been sentenced, under the first indictment, to two years' imprisonment in the penitentiary. On the second trial he asked the court to instruct the jury that if they believed, from the evidence, that the goods of Curle and Gibson were stolen at one and the same time, then the circumstances of said goods

belonging to separate owners did not constitute several offences, and that if any person, by the same act, and at the same time, should steal the goods of A. B. and C., this constituted but one felony or offence against the State; and that if they should believe, under the preceding instruction, that the stealing of the goods of said Curl and Gibson was one transaction, then the former conviction of the prisoner operated as a bar. This instruction was refused. On appeal to the Supreme Court, it was held that the instruction should have been given.

The Supreme Court said: "The stealing of several articles of property, at the same time and place, undoubtedly constitutes but one offence against the law; and the circumstances of several ownerships cannot increase or mitigate the nature of the offence."

In the general form of indictment at common law, for larceny, the goods are described as belonging to different owners; 3 Chitty's Cr. Law, 959. Under this form is found the following note: "Where several persons' goods are taken at the same time, so that the transaction is the same, the indictment may properly include the whole; but not so, if the taking were at different times." Here the stealing of the goods of different persons, at the same time, is treated as grand larceny, and as being but one transaction.

In the case of Jackson v. The State, and the case of Lanpher v. The State, 14 Ind. R., 327, reporting but one of the cases, the indictment charged the defendant with stealing two horses. It appeared that he stole, with the horses, saddles and bridles, though not so charged in the indictment, and this was objected to as a fatal variance. The court held "that the omission to include in the indictment other articles stolen at the same time, and forming a part of a single offence, was for the defendant's benefit, if it had any bearing in the case. The State cannot split up one crime and prosecute it in parts. A prosecution, for any part of a single crime, bars any further prosecution based upon the whole or a part of the same crime."

Also, Roberts & Copenherden v. The State of Georgia, 14 Ga., 12. In this case the court said: "The plea of *autrefois acquit* or *convict*, is sufficient, whenever the proof shows the second case to be the same transaction with the first."

On the same point, 2 Graham & Waterman on New Trials, 54, 55.

Our conclusion is that the stealing of different articles of property belonging to different persons, at the same time and place, so that the transaction is the same, is but one offence against the State, and that the accused cannot be convicted on separate indictments, charging different parts of one transaction as a distinct offence. A conviction on one of the indictments bars a prosecution on the other.

Whether or not the appellant can bring his case within this rule can only appear on a new trial.

The present case does not affect the punishment of theft, under specified circumstances, as where it is coupled with burglary, and the punishment is double, as provided by statute.

It is not necessary to decide to what extent offences, other than theft, may come within the scope of the opinion.

For the error in striking out the special plea in bar, the case is reversed and remanded.

Reversed and remanded.

LOWE v. STATE.

(57 Ga., 171.)

LARCENY.—The indictment alleged that the defendant stole two hogs belonging to different owners, on the same day. Held that the indictment charged but one offence.

Jackson, J. The indictment alleged that the defendant stole two hogs belonging to different owners, on the same day, and in the same county. He was found guilty, and moved to arrest the judgment on the ground that two offences were charged.

1. We think the indictment covers one transaction, and charges but one offence, and is good—certainly good as against a motion to arrest judgment after verdict.

2. The proof only justifies the conviction for stealing one of the hogs. The penalty or punishment prescribed by the law, and inflicted by the judge, being the same, whether one or both were stolen, the verdict is sustained by the evidence, and the motion for a new trial on this ground was properly overruled.

Judgment affirmed.

IRWIN v. THE STATE.

(8 Texas Ct. of App., 46.)

LARCENY.—The defendant was charged in one count of the indictment with theft of money belonging to a person therein named, and by another count with the theft of the same kind and amount of money, at the same time and place, from an owner unknown. *Held*, that the indictment charged but one offence.

WINKLER, J. The appellant was tried and convicted of theft of money, on an indictment containing two counts. The first count charges that the money alleged to have been stolen belonged to one Frank Price; the second count alleges that it belonged to some person to the grand jury unknown.

The defendant excepted to the sufficiency of the indictment, on the following grounds: "1. Because the offence is not set forth in plain and intelligible words. 2. Because, as concerns the second count, it does not appear that the court has jurisdiction to try the case. 3. Because said indictment is duplicitous in that it charges two separate offences if it charges anything." The objections to the indictment were overruled by

the court, and the ruling is assigned as error. Is is not necessary that we consider the first two grounds of exception to the indictment further than to say they are untenable.

With regard to the third ground, the objection being that the indictment charges two separate offences if it charges any offence, we are of the opinion that the indictment is not obnoxious to the objection, and that instead of charging two separate offences it charges but one. The two counts charge the theft of the same amount and kind of money, averred to have been taken at the same time and place, and by the same person, and vary from each other so far as to meet the testimony with regard to the ownership of the money alleged to have been stolen by the defendant, but no further. Mr. Wharton says: "It cannot be objected in error that two or more offences of the same nature, on which the same or a similar judgment may be given, are contained in different counts of the same indictment; nor can such objection be maintained, either on demurrer or arrest." Whart. Cr. Law, sect. 415. It is true that, as a general rule, the criminal law never permits the joinder of two or more distinct offences in one count. 1 Bishop's Cr. Proc., sect. 432; Whart. Cr. Law, sect. 382; The State v. Darsett, 21 Texas, 656. But as was said by this court in Weathersby v. The State, 1 Texas Cr. App., 645, on the authority of Mr. Bishop and Mr. Archbold, "that it is permissible to charge, in separate counts, two or more offences in the same indictment, seems to be an established rule, as laid down by the standard authorities, in this country." There was no question raised as to an election, in the present case. There was no error in refusing to quash, or in overruling the defendant's exceptions to the indictment.

The objection to the charge of the court based on the second count in the indictment falls with the ruling on the exceptions to the indictment. Other supposed errors are assigned, which have been considered, but are not necessary to be discussed. There is no valid objection to the conviction of the appellant, and the judgment is affirmed.

Affirmed.

NOTE.—In State v. Stevens, 62 Maine, 284, the indictment charged that John Stevens of &c., "seven national bank bills, each of the denomination

of twenty dollars, and of the value of twenty dollars, of the lawful currency of the United States; six national bank bills, each of the denomination of ten dollars, and of the value of ten dollars, of the lawful money of the United States, and pocket book of the value of one dollar, and one shoe knife of the value of twenty-five cents, of the goods, chattels and money of John S. Kelly of &c." In overruling a motion in arrest of judgment, Barrows, J., said: "The spoils of a single larcenous act may all be included in one count, and the indictment is not thereby vitiated on the ground of duplicity.

"The defendant is charged with but one crime."

In People v. McCloskey, 5 Parker's Crim. Rep., 57, the defendant was indicted for burglary in the third degree, for breaking and entering with felonious intent, a room used for storing beer. The prisoner had been convicted of petit larceny for stealing beer upon the occasion of the burglary, which conviction he pleaded in bar of the charge of burglary.

ALLEN, J. Among other things said: "The conviction for petit larceny before the Court of Special Sessions, constituted no bar to the indictment for burglary. The two crimes are entirely distinct. The court before which the first conviction was had, had no jurisdiction of the higher offence, and consequently a conviction or acquittal for the burglary would have been void as *coram non judice*. As the prisoner could not have been convicted of the burglary before the Court of Special Sessions, he cannot, upon being arraigned and tried upon an indictment, in a court having jurisdiction, allege that he is 'twice put in jeopardy for the same offence.'"

GOODALL v. STATE.

(22 Ohio St., 203.)

LARCENY.—Proof of the larceny of silver-plated articles will sustain a charge for the larceny of silver ware.

The property charged to have been stolen was described as "one *silver* coffee-pot, one *silver* tea-pot," etc. On the trial it was shown that the articles were what are denominated *plated* ware, consisting of only one twenty-fifth part silver. For the prisoner it was argued that the evidence did not support the indictment.

BY THE COURT. At common law this would have been a fatal variance, and the only question is whether the defect is cured by section 91 of the Criminal Code, 66 Ohio L., 301. It is there provided, that when there is a variance between the statement in an indictment and the evidence offered in proof thereof, "in the name or description of any matter or thing whatsoever therein named or described, such variance shall not be deemed ground for an acquittal of the defendant, unless the court, before which the trial shall be had, shall find that such variance is material to the merits of the case, or may be prejudicial to the defendant."

There being no such finding by the court, it seems to us that the case comes fairly within this provision of the code, and that the defect is cured by it. To what cases of defective description this provision of the Criminal Code can be constitutionally applied, or what is the exact line between a "variance"

within its meaning, and a failure of proof, we need not decide in the present case. We think it safe at least to give it effect in cases like this, where the false part of the description being rejected, a perfect legal description remains; and where the court do not find, and it does not appear in proof, that it was material to the merits of the case, or that the defendant was prejudiced thereby.

Motion overruled.

LON WILLIAMS v. THE STATE.

(5 Texas Ct. App., 116.)

LARCENY.--The thing stolen must be correctly described for the purpose of identification, and when a party has been indicted for the theft of either gold or silver coin, the kind of coin must be specified.

ECTOR, P. J. The appellant in this case was indicted for theft of "fifty silver half-dollar pieces, each piece being of the value of fifty cents, the same being corporal personal property, and altogether of the value of twenty-five dollars, and the property of George Baker," without stating that the money was the current silver coin of the United States of America, or any other government, and without giving any further description of the same.

The indictment, we believe, is defective because the description of the property alleged to have been stolen is not sufficient. When gold or silver coin has been stolen, there should be such a description of the money as to call to mind the particular coins, so as to identify the thing stolen; and when it cannot be done by the grand jury, the indictment should state this fact.

After a careful examination of the cases we have been able to find, which have been decided by courts of last resort both in England and America, we have been forced to the conclusion that the defendant's motion in arrest of judgment should have been granted by the District Court, because the indictment does not give a sufficient description of the property alleged to have been stolen, nor show any reason why such description was impracticable. There is no question better settled in pleading than that the thing stolen must be correctly described, for the purpose of identification, and when a party has been indicted for the theft of either gold or silver coin, the kind of coin must be specified, when this can be done, by the grand jury; and when it cannot be done, it is proper that the indictment should show that fact. Mr. Wharton says: "Money is described as so many pieces of gold or silver coin of the realm, called——. The pieces of the coin must be specified." 1 Whart. Cr. Law, sec. 363. Mr. Bishop and Mr. Chitty recognize the same strictness in pleading when a defendant is charged with the theft of money: 2 Bishop's Cr. Proc., sections 703, 704; 2 Chitty's Cr. Law, 947, 960. See also The State v. Longbottom, 11 Humph., 39; The Commonwealth v. O'Connell, 12 Allen, 183; The People v. Ball, 14 Cal., 101; The People v. Cohen, 8 Cal., 42.

In the case of The State v. Longbottom, the Supreme Court of Tennessee says: "When personal chattels are the subject of an offence, as in larceny, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated: 2 Hale's P. C. 182, 183; Arch. Cr. Pl. 49, Lond. ed. Money should be described as so many pieces of the current gold or silver coin of the realm. And the species of coin must be stated by the appropriate name."

In this respect the indictment in the case at bar was clearly defective, and the motion in arrest of judgment should have been granted in the court below. The judgment of the district court is reversed and the cause remanded.

Reversed and remanded.

NOTE.—In People v. Ball, 14 Cal., 101, the defendant was charged with the larceny of "three thousand dollars lawful money of the United

States." In holding the description insufficient the Supreme Court said: "This description is not sufficient. In an indictment for larceny, money should be described as so many pieces of the current gold or silver coin of the country, of a particular denomination, according to the facts. The species of coin must be specified. Arch. Cr. Pl., 61; Whart. Cr. Law, 132."

In Rhoons et al. v. Commonwealth, 2 Duvall (Ky.), 159, the appellants were charged with stealing "one lot of treasury notes, called greenbacks, the issue of the treasury of the United States of America, and one lot of Kentucky bank notes, and fifteen dollars in gold coin." The court said: "On the subject of indictments, our criminal code recognized and established the modern common law, rightly understood and rationally applied. It dispenses with form, and requires substance only. And what is now substance at common law is substance under the code—and that is every fact necessary to constitute the specific crime charged—alleged with only such precision as:

"1st. To enable the court to see that, admitting the fact, it has jurisdiction, and that the imputed crime has been committed by the accused. 2d. To enable the accused to understand the precise charge, and, without surprise, to prepare for defence against the proof which may be admissible to sustain the specific charge. 3d. To make the verdict and judgment certainly available as a bar to any subsequent prosecution for the same criminal act. According to this test, the indictment in this case seems to us insufficient to authorize conviction."

"One lot of treasury notes, without any specification of denomination, number or value, is too indefinite for the identification of the thing taken, or of any part of it; and one lot of Kentucky bank notes, without even a specification of the bank, is still more indefinite.

"Neither of these charges sufficiently notified the accused of the facts to be proved; and a conviction on either of them might not be availably pleaded in bar of another indictment for the same offence. A minute description of all the treasury and bank notes might be impossible, and, therefore, is not required. But a nearer approach to it than this indictment makes may be presumed to have been easy, and ought to be required. A specification of even one of the notes in each lot, so as to identify it, might be sufficient to answer the ends of the test just defined.

"Nor can fifteen dollars in gold coin, without any specification of the number of pieces, or of the character or identity of the coin, or of any portion of it, be deemed sufficient for all the purposes of the law."

In Barton v. State, 20 Ark., 68, the appellant was charged with the larceny of one hundred and thirty dollars. In reversing the judgment the court said:

"The objection to the indictment is, that it does not specifically describe the money alleged to have been stolen.

"The appellant is charged with stealing 'one hundred and thirty dollars,' etc. Whether the subject of the larceny was coin, United States treasury notes, or bank notes, is not alleged.

"If the term 'dollars' may be said to have a legal meaning, and to import the national coin, Rowe v. Green, et al., 24 Ark., we are left to

conjecture what kind of coin the appellant was charged with stealing. It is a loose attempt at a code indictment.

"The code provides that: 'The only ground upon which a judgment shall be arrested is, that the facts stated in the indictment do not constitute a public offence within the jurisdiction of the court; and the court may arrest the judgment without motion, on observing such defect.' Gantt's Dig., sec. 1975.

"What is the meaning of this section of the code? To charge a man with shooting at the moon would not be charging him with a public offence. To charge him with stealing in Texas would not be charging an offence within the jurisdiction of an Arkansas court. To charge a man with larceny merely, would be charging him with a public offence by a technical name only. Is it in such instances, or similar instances only, that the judgment may be arrested? We think not. Such could not have been the intention of the framers of the code. It requires certain facts to make any public offence of whatever name, and these facts, well ascertained in law, and easily apprehended by ordinary intelligence, should be alleged in the indictment whether framed under the code or under the common law."

In Low v. People, 2 Parker Criminal R. The first count in the indictment described the property as "one pocket book of the value of 50 cents, and $60 in bank bills, current money, of the value of $60;" and in the fifth count the same property was described as, "one pocket book of the value of 50 cents, and its contents, to-wit, bank bills, being current money of the State of New York, of the value of $60." In holding the description insufficient, Wright, J. said; "The first and fifth counts describe the property stolen as "sixty dollars in bank bills, current money of the value of sixty dollars," and "bank bills, being current money of the State of New York, of the value of sixty dollars." This, it appears to me is too general and without precedent. The counts contain no statement as to the number of bills stolen, whether two or twenty; and number is a part of the description applicable to chattels, and should not be omitted. Archbold's Crim. Plead., 45; 2 Russell on Crime, 107; 2 Hale, 183; Barb. Crim. Law, 168-69. In an indictment for stealing bank notes, it is not necessary to set out the instrument *verbatim*. They may be described in a general manner, as a bank note; nor is it necessary to state the value of each note; but the number must be stated, and then it is sufficient to state the value in the aggregate. In respect to number, the indictment should be certain. Archbold says: "When personal chattels are the subject of an offence, as in larceny, they must be described specially by the name usually appropriated to them, and the number and value of each species or particular kind of goods stated. Arch. Cr. Pl., 49; 2 Hale, 182, 183. The omission to state any number of bills stolen, may be technical; but in an indictment for felony, when the liberty of the citizen is placed in jeopardy, there should be certainty and precision. The prosecution should at least be called upon, to a reasonable extent, to specifically apprise the defendant of the charge against him."

In State v. Murphy, 6 Ala., 846, the property was described as "sundry

pieces of silver coin made current by law, usage and custom within the State of Alabama, amounting together to the sum of five hundred and thirty dollars and fifteen cents, and this was held to be insufficient.

In State v. Longbottom, 11 Hump., (Tenn.), 39, the property was described as "ten dollars good and lawful money of the State of Tennessee," and on conviction, the judgment was arrested, and the State appealed from the order arresting judgment.

The Supreme Court said: "Where personal chattels are the subject of an offence, as larceny, they must be described specifically by the name usually appropriated to them, and the number and value of each species of particular kind of goods stated; 2 Hale, 182-3; Arch. Cr. Pl., 49. Money should be specified as so many pieces of the current gold or silver coin of the realm. And the species of coin must be stated by its appropriate name; Arch. 50." The court held the description insufficient.

In State v. Berryman, 8 Nevada, 262, the indictment charged "the said defendants, Joseph Oxford and James Berryman, on the thirtieth day of July, A. D., 1872, at the county of Lander, in the State of Nevada, . . six hundred and ten pounds of silver-bearing ore, of the value of eight hundred dollars, of the property of the Manhattan Silver Mining Company of Nevada, a corporation," etc. It was claimed by the defendant that the property alleged to have been stolen savored of the reality, and that there was no sufficient statement of facts in the indictment to show that the thing taken was personal property. In holding the description sufficient, Hawley, J. said: "The character of the property, whether real or personal, must be determined by the statement of facts set out in the indictment. Sec. 241 of the Criminal Practice Act provides that "the words used in an indictment shall be construed in the usual acceptance in common language, except such words and phrases as are defined by law, which are to be construed according to their legal meaning"

The word *ore* is not defined by law, and must therefore be construed in its usual acceptation. The words "silver-bearing ore," as used in the indictment, have reference to a portion of vein matter which has been extracted from a lode and assorted, separated from the mass of waste rock and earth and thrown aside for milling or smelting purposes, or taken away from the ledge. . . . In our judgment, the language used in the indictment necessarily implies that the ore had been severed from the freehold prior to the time of its asportation by Oxford and Berryman. We think that the act charged is stated with sufficient certainty to enable the court to pronounce judgment according to the right of the case, and that it is all that the statute, in this respect, requires."

In The People v. Williams, 35 Cal., 673, the indictment charged the taking and carrying away "from the mining claim of the Brush Creek Gold and Silver Mining Company . . fifty-two pounds of gold-bearing quartz rock." The court said that the indictment was "entirely silent as to whether the rock was a part of a ledge, and was broken off, and immediately carried away by the defendant, or whether, finding it already severed, he afterwards removed it." And for the uncertainty in the description it was set aside.

In State v. Stevens, 62 Maine, 284, the indictment charged that John Stevens of, &c., "seven national bank bills, each of the denomination of twenty dollars, and of the value of twenty dollars, of the lawful currency of the United States; six national bank bills, each of the denomination of ten dollars, and of the value of ten dollars, of the lawful money of the United States; one pocket book of the value of one dollar, and one shoe knife of the value of twenty-five cents, of the goods, chattels, and money of John S. Kelly of, &c. The defendant was convicted and moved in arrest of judgment, because, among other reasons, the bills said to have been stolen are not alleged to have been genuine, or issued by any national bank, and that the description was uncertain and insufficient. Brown, J. said: "It would commonly be difficult, if not impossible, for those who lose bank bills by theft to designate the banks by which the various bills were issued, and we do not think the constitutional requirements which the defendants' counsel invokes, call upon us to facilitate the escape of thieves in the manner proposed. The indictment upon which the defendant was convicted, describes the number and denomination of the bank bills stolen, and alleges the value of each. It was not necessary to set forth the names of the banks by which they are issued, nor to assert their genuineness more distinctly than it is done in the allegation of the value. Even the description of them as "lawful currency, etc., may well be rejected as surplusage. That which is made punishable as a crime by the statute, is distinctly charged with as much particularity as the nature of the case will ordinarily permit. Commonwealth v. Richards, 1 Mass., 337; Eastman v. Commonwealth, 4 Gran, 416."

JOHN SIMPSON v. THE STATE.

(10 Texas Ct. App., 681.)

LARCENY.—Where a person or thing, necessary to be mentioned in an indictment, is described with unnecessary particularity, all the circumstances of description must be proved, for they are all made essential to the identity.

WINKLER, J. The appellant, being on trial charged with the theft of five silver certificates, United States currency bills, of the denomination and value of ten dollars each, and

of the aggregate value of fifty dollars, it became a question whether the proof adduced on the trial was sufficient to support the descriptive averments in the indictment as to the silver certificates alleged to have been stolen. It is averred in the indictment that the five silver certificates alleged to have been stolen were United States currency bills, and that each one of the silver certificates was of the denomination of ten dollars and of the value of ten dollars; and the aggregate value is also averred at fifty dollars. It became necessary, in order to a conviction, that the State should substantiate by testimony these descriptive averments contained in the indictment: first, that the silver certificates mentioned in the indictment, or a portion of them at least, had been issued by authority of the United States government, and secondly, that the silver certificates, or a portion of them at least, were of the value alleged in the indictment.

The court in its general charge, having omitted to give the jury an appropriate charge on this subject, the defendant's counsel attempted to supply and correct the omission in the charge of the court by requesting that special instructions be given to the jury to the effect that every material allegation charged in the indictment must be proved as alleged. This instruction was refused by the court. The ground of the refusal being, as stated by the judge, that the law applicable to the case had been given in the general charge, counsel for the defendant requested other special instructions to be given to the jury, calling their attention especially to the necessity that the proof must show that the silver certificates had been issued by authority of the United States government; and also that the silver certificates were of the value of ten dollars each, as alleged, in order to warrant a conviction. These instructions were also refused. It is conceded that these several special instructions were in some respects inartistically framed, yet it is believed that they were sufficient to call the attention of the court to what we regard as an important omission in the general charge.

However this may be, we are of opinion that it was indispensable that the averments descriptive of the property alleged to have been stolen, as set out in the indictment, should have

been proved substantially as averred, and that the jury should have been properly informed on this branch of the subject, as a part of the law of the case, and whether requested or not. It cannot longer be considered an open question in this court that the descriptive averments incorporated in an indictment for the purpose of identifying the offence charged, as, for instance, for the purpose of identifying property alleged to have been stolen, must be proved as alleged; and the rule applies even where the averment of identity is unnecessarily particular. Warrington v. State, 1 Texas Ct. App., 168; Courtney v. State, 3 Texas Ct. App., 382; McGee v. State, 4 id., 625; Watson v. State, 5 id., 11; Hampton v. State, 5 id. 463; Allen v. State, 8 id., 860.

Where a person or thing, necessary to be mentioned in an indictment, is described with unnecessary particularity, all the circumstances of description must be proved; for they are all made essential to the identity. 1 Greenl. § 65. A plain application of the rule and the reason for it is given in the elementary works on evidence, as follows: "In an indictment for stealing a *black* horse, the animal is necessarily mentioned, but the color need not be stated; yet if it is stated, it is made descriptive of the particular animal stolen, and a variance in the proof of the color is fatal." 1 Stark. Ev., 374; 1 Greenl, Ev., § 65.

The case of theft of particular kinds of property, for example, theft of a horse, which is punishable by confinement in the penitentiary, without regard to the value of the horse, proof of value is of but little moment; but in cases of theft generally, and when a particular punishment is not prescribed without regard to value, proof of value is necessary in order to determine the punishment; the law being that theft of property of the value of twenty dollars, or over that amount, is punishable as a felony by confinement in the penitentiary, not less than two nor more than ten years (Penal Code, art. 735); whilst theft of property, under the value of twenty dollars, is punished by imprisonment in the county jail not exceeding one year, during which time the prisoner may be put to hard work, and by fine not exceeding five hundred dollars, or by such imprisonment without fine: Penal Code, art. 736; Sheppard v. State, 1 Texas Ct. App., 522.

Because of error in the failure of the court to charge the law of the case as made by the proofs, and because there is no pertinent evidence of the value of the property alleged to have been stolen, the court below should have granted the defendant a new trial. Other errors are complained of, which are not likely to arise on another trial; but for those pointed out above, the judgment must be reversed and the cause remanded.

Reversed and remanded.

NOTE.—In Ranjel v. State, 1 Texas Ct. App., 461, the indictment charged the defendant with the theft of a bay gelding, branded P. A. R. The evidence of the prosecuting witness showed that the horse which he lost was branded P. R. A. *Held*, that the variance could not be treated as surplusage, that it was unnecessary to use such minuteness of description in the indictment, but having been so used by the pleader, it was made material and essential to the identity of the thing stolen, and that the variance was fatal.

In People v. Fallon, 6 Parker Crim. Rep., 256, the defendant was charged with the larceny of "four written promises for the payment of money, commonly called bank bills and notes, of the nature and denomination of five dollars each; one written promise for the payment of money commonly called a bank bill and note, of the value and denomination of ten dollars, from the person of Daniel Main, of the money, goods, chattel and personal property of Daniel Main, then and there being found, then and there feloniously did steal, take and carry away, against the peace," etc. A motion to quash the indictment for uncertainty was overruled and the charge held sufficient. But the motion was made after verdict, and the court said: "The fact that the $10 bill had been paid out and received as $10 was some evidence of its value, and the presumption is that it was a genuine bill, and of the value of ten dollars."

CROCKETT v. STATE.

(5 Texas Ct. App., 526.)

LARCENY.—Ownership, care and management of the property, whether the same be lawful or not, is sufficient ownership to maintain a prosecution for the larceny thereof.

The case is sufficiently stated in the opinion.

WHITE, J. The indictment alleged the ownership of the cow to be in Madam Benson. Proof showed the cow was the community property of Madam Benson, and the three minor children of her deceased husband and herself; that the minors lived with their mother, who was head of the family; and that the cow was taken from its accustomed range.

A bill of exceptions was saved to the third paragraph of the charge to the jury, which was: "3. If the cow of Madam Benson was in its usual and accustomed range, and if the same was fraudulently taken by defendant and appropriated to his use, so as to come within the definition of theft, as already given you in charge, then such cow was in the possession of the owner, and no further possession of the owner is necessary to be shown. If the proof shows that the cow was owned by Madame Benson, and her children by Benson, at Benson's death, and if Mrs. Benson, as widow of deceased Benson, was the head of the family, and as such she claimed to and did control, use, care for, and possess for herself the cow alleged to have been stolen, then such ownership, jointly with her minor children by Benson, and possession by herself, is sufficient; and it is of no importance that the ownership was partly in the minor children of Benson, deceased."

We see no error in this charge. An animal is in the possession of its owner when in its accustomed range: Jones v. The State, 3 Texas, Ct. App., 498. "Possession of the person so unlawfully deprived of property is constituted by the exercise of the actual control, care, and management of the property, whether the same be lawful or not." Pas. Dig., art. 2387; Gaines v. The State, 4 Texas Ct. App., 330.

Upon the other doctrine, enunciated in the latter portion of the charge, the case of Henry v. The State, 45 Texas, 84, is directly in point. Henry was indicted for the theft of "two certain oxen," the property of Mrs. Mary Cobb. The testimony showed that the property belonged to Mrs. Cobb, and the children of her deceased husband, on whose estate there had been no administration, and was in possession of Mrs. Cobb before the theft. It was held that the proof sustained the allegation of ownership, and the conviction was sustained. See also Ware v. The State, 2 Texas Ct. App., 547.

We are unable to perceive any error in the proceedings had on the trial below, which resulted in the conviction of this appellant; and the judgment is therefore affirmed.

Affirmed.

STATE v. FENN.

(41 Conn., 590.)

LARCENY.—Defendant's note was left with a bank for collection; an officer of the bank took the note to defendant's office to demand payment; defendant asked to see the note; it being handed to him by the officer, he walked off with it, and never returned it. Upon these facts a conviction of larceny was sustained.

The note was payable to W. or order, and was by W. endorsed to H., and by H. endorsed in blank and left by him at the bank for collection.

The note was described in the information as the property of H. *Held* that the ownership was properly alleged.

The information charged that at the town of New Haven, on the 3d day of May, 1873, William S. Fenn, of said town, with force and arms, one certain promissory note, dated November 6, 1872, signed by the said Fenn, for the payment of twenty-three hundred dollars, for value received, to F. J. Whittemore or order, on the 1st day of May, 1873, and by the said F. J. Whittemore endorsed, and by him delivered to Henry A. Warner, of said New Haven, a more particular description of which is to the attorney for the State unknown, of the goods and chattels of said Henry A. Warner, and of the value of twenty-three hundred dollars, feloniously did steal, take and carry away, contrary to the statute in such case made and provided, and against the peace.

Upon the trial William T. Bartlett testified as follows: On the 30th of April, 1873, I was, and ever since have been, the treasurer of the Union Trust Company of New Haven, a company engaged in banking business, and on that day Henry A. Warner left with me as such treasurer, a note for collection, the proceeds to be placed to the credit of Warner if collected, but if not paid on demand, the note to be protested in the usual manner. . . . . I had sent notice to Fenn of the time the note fell due, and on the 3d day of May, 1873, the note not being paid, I took it, being a notary, to demand payment and protest it. Having the note, I called on Fenn at his office in the Globe building, New Haven. I said to Fenn: "I came to make an official demand for the payment of this note," at the same time holding the note in my hand. Fenn said: "You wish it paid, do you?" I said: "I do." Fenn then said: "Do you wish it paid to-day?" I said: "Certainly, it is due to-day." Fenn then said: "Let me see the note." I placed the note in his hand as he was sitting down. He took it and turned it over and examined the endorsements, as was customary, and then asked me: "What is the amount of interest due?" I replied that I had not computed it, understanding that he was not ready to pay it. Fenn then said: "Well, figure the interest." I then looked about for a bit of paper

and commenced to figure the interest, the note still being in his hand; he had moved off some distance from me at that time. While I was busy computing the interest, Fenn said: "I would like to speak to a friend a moment," and stepped out. I waited as I supposed a sufficient time for his return, and he not appearing, I stepped to the door leading from the room at the top of the stairway leading to the street. I stopped for a short time, when Fenn appeared coming from an inner apartment. He was about to pass me and go down the stairs to the street, and said: "Step into my office a moment, and I will step out and get the money." I said that he had better leave the note with me while he went out. He then said he had handed the note to a friend, or placed it in the hands of a friend. I said to Fenn that he could not leave the building till he produced the note. He turned and went into his office. I then went to the foot of the stairs and saw a policeman, and requested him to sit in the room occupied by Fenn till my return. . . . . Upon my return Fenn said he could not produce it, as it was in the hands of a friend. I said: "Can you produce the note if you go to see your friend?" . . . He said he could see. Not getting any satisfaction, I went out and put the matter in the hands of John W. Alling, city attorney. Mr. Alling drew up the necessary papers and went to Fenn with me. He said to Fenn that he had got himself into trouble, and he had better produce the note. Fenn said he could not do so. Alling then asked Fenn what he had done with the note. He replied that he went to the water closet and used it. Alling said it was an important matter, and he had better go to the water closet and see if it couldnot be found, and I believe they went. . . . . They soon returned and reported that they had examined the water closet without having found the note. I then left the matter in the hands of the city attorney, and returned to my place of business.

John W. Alling, city attorney, and George S. Selleck, policeman, gave similar testimony in behalf of the State.

William S. Fenn, the accused, testified in his own behalf as follows: The note was given by me to F. J. Whittemore for $2,300, as part of the consideration on a trade with Whittemore in exchanging land. I agree with the statement of

Bartlett and Alling as to what took place at my office. When Bartlett handed me the note I had no intention of destroying it. The water closet is situated at the west end of the hall, on the same floor with my office. I had the note in my hand, and as I rose from the seat, when I threw the paper into the bowl, the note went with it. This note was secured by mortgage.

Upon cross-examination, the defendant insisted that what he did with the note was an accident, and that Whittemore had defrauded him in the exchange of land for which the note was given. He also introduced other evidence to the same point, and claimed to have proved the fraud. On the other hand the State offered evidence to rebut the claim of fraud, and claimed to have proved, that the exchange of land was a fair transaction, and perfectly understood by Fenn, and that there was no fraud whatever.

The defendant requested the court to charge the jury as follows:

1. That the defendant was entitled to an acquittal because a full and particular description of the note was known to the states' attorney at the time of instituting the prosecution, and was not given in the information. Which request was refused.

2. That the defendant was entitled to an acquittal because the description of the note offered in evidence and the indorsement were each materially variant from the note and indorsement described in the information. Which request was refused.

3. That the defendant was entitled to an acquittal because there was no legal evidence introduced to prove that Warner was the owner of the note; but, on the contrary, his blank indorsement on the note showed that the title was not in him; and because there was no evidence that Whittemore ever delivered or endorsed the note to Warner or sold it to him.

The court did not so charge the jury, but charged on this point, as follows:

"The State is bound to prove, and the jury must be satisfied, from the evidence, beyond a reasonable doubt, that the note in question, when taken by the defendant, was the property of Henry A. Warner, as alleged in the information. The note, it is conceded, was originally given by the defendant to

Whittemore, and payable to his order; it must therefore be proved that the title to the note passed from Whittemore to Warner, and that when taken, it was the property of Warner. It is alleged in the information that Whittemore indorsed and delivered it to Warner, and evidence to satisfy you of this fact is essential. A note payable to order does not pass by delivery alone, but must also be indorsed. The State claims to have proved that Warner was the owner of the note, from the testimony of the defendant, that he gave the note to Whittemore; that on the back of the note were the words: "Pay Henry A. Warner. F. J. Whittemore." And from the testimony of Bartlett, that he received the note from the hands of Warner, with instructions to collect it and place the proceeds to Warner's credit, and if not collected, to protest it; and it will be for the jury to determine, from all the evidence in the case, whether Warner owned the note at the time it was taken by the defendant. If you are not satisfied, from the evidence, that Warner was such owner, it will be your duty to return a verdict of not guilty. The fact that the note was indorsed in blank by Warner will not prevent it from being his property, provided such indorsement was made merely for purposes of collection."

4. The defendant further claimed that the court should charge the jury that he was entitled to an acquittal, because there was no evidence introduced to prove that the note at the time the same was taken by the defendant was of any value whatever.

The court did not so charge the jury but instructed them as follows: "The State is bound to prove that the note was of some value, and if not proved the jury must acquit the defendant. The jury are not restricted to direct evidence showing the value, but may consider any evidence, though indirect, from which the value may naturally be inferred."

5. That the court should instruct the jury that the act of taking, to constitute theft, must be private, or designed by the taker to be private, and without the knowledge of the owner or the public, and further, that by the term "felonious intent," as applied to theft, was meant an intent to deprive the owner of his property privately without his knowledge or the knowl-

edge of the public, and to convert the same to the use of the taker in such a manner as to prevent the owner from knowing where his property was, or who had taken it.

The court did not so charge the jury, but instructed them as follows: "It is essential that the evidence convince the jury beyond a reasonable doubt that the defendant took this note, as alleged, with a felonious intent. Without a specific and actual intent to steal, there can be no theft, and the taking, though wrongful, would be only a trespass, and the act of taking the note, and this felonious intent to steal must both concur in fact and in point of time. This felonious intent must be to deprive the owner of his property on the one hand, and on the other the taker must intend some gain or advantage to himself, in distinction from a mere act of mischief to another. But it is not legally essential to constitute the crime of theft that the taking be secret or in the night, though the jury will bear in mind that such circumstances are most pregnant evidence to manifest the intent. If the taking was secret or designed to be so, or was under the cover of darkness, it would be the strongest kind of evidence to show a felonious intent; and if, on the other hand, the taking was open, or in the presence of the owner or of other persons, it would be equally strong evidence that the taking was without a felonious intent, and therefore a mere trespass; but these things are matters of evidence for the jury, who alone are to find the intent upon consideration of all the circumstances; and if instead of a clandestine or private taking, or a taking under cover of darkness, designed by the taker to conceal his outward act, there be a taking by stratagem, artifice or fraud, designed by the taker to conceal his mental purpose, which is precisely the same in both cases, then the act is the same and the crime the same in both cases."

6. The defendant further claimed that the court should instruct the jury that the act of taking, accompanied by all the circumstances stated by the witnesses on the part of the State as matter of law, did not constitute theft. But the court did not so instruct the jury.

7. Also that the claim of the act, that the possession of the note was obtained by fraud, was not supported by the evidence,

that the defendant asked Bartlett to let him see the note, and that therefore Bartlett handed Fenn the note, and that all the subsequent acts and declarations of Fenn after he had obtained possession of the note, had no bearing upon this question of fraud in obtaining it.

This the court refused, and instructed the jury as follows:

"It will be for the jury to decide what Fenn meant by the request to Bartlett to let him see the note. Did he intend thereby to have Bartlett understand that he wanted the mere temporary possession of the note, merely to see if it was genuine, to examine indorsements and signatures, to compute the interest, or to pay it, while at the same time his real purpose was, in that way permanently to deprive Bartlett of the note and to steal it? The request to see the note might have an honest or dishonest purpose, and to enable the jury to determine the real purpose and meaning of the request, the subsequent acts, false declarations and conduct of the accused, may be received and considered by the jury, although it is obvious that if specific acts of falsehood, artifice or fraud could be shown prior to the delivery of the note by Bartlett to Fenn, the evidence would be more weighty."

8. The defendant further claimed that the court should instruct the jury that they would not be justified in finding the defendant guilty, although at the time he received the note from Bartlett, he intended to convert it to his his own use, unless they should also find that he took it without the consent of Bartlett, or that he obtained Bartlett's consent to his taking it by falsehood, or by force, or by fraud.

Upon this point the court gave the jury the following instruction:

"In order to find the defendant guilty, the jury must find that at the time he asked Bartlett to let him see the note, he had a felonious intent existing in his mind, and if the jury should find that he obtained possession of the note from Bartlett by stratagem, artifice, or fraud, and that he falsely pretended to him that he wanted to see the note for the mere purpose of computing the interest, or paying it, when in fact he had no such design, but intended to deceive, and did deceive him, and his real intent then formed and existing in his mind,

was to get hold of the note and deprive Bartlett or the owner permanently of it, with the intent thereby to secure a pecuniary advantage to himself, then the jury might find him guilty of theft."

The jury returned a verdict of guilty, and found the value of the stolen note to be twenty-three hundred dollars.

The defendant moved for a new trial for error in the rulings and charge of the court, and upon the ground that the verdict was against the evidence in the case.

Phelps, J. The defendant moves for a new trial from a verdict against evidence, and from the admission by the court of certain testimony offered by the State and objected to by him; and also from sundry alleged errors of the court in its instruction to the jury.

1. We are satisfied from the testimony recited in the motion that the verdict is not so manifestly against the weight of evidence properly admitted in the cause, as to require us, on that ground, to set aside the verdict.

The State was bound to prove the felonious intent by the defendant at the time of the taking of the property; that it was of some actual and intrinsic value, and was the property of the person named as owner in the information, and that it was taken by the defendant either secretly and without the knowledge of the owner, or openly by deception, artifice, fraud, or force, and with the design then entertained to deprive the owner of it and secure to himself some personal benefit from the wrongful taking. We think the evidence detailed in the record justified the jury in finding all these propositions proved. The direct proof of the value and ownership of the note was not in itself necessarily conclusive, but we think it was so far corroborated by the circumstances, and especially by the conduct of the defendant that we cannot properly say the verdict with respect to those allegations was unwarranted.

2. The note was proved, on the trial, to have been payable with semi-annual interest, and all taxes that should be assessed on the amount of money represented by it. The description of it in the information omitted these particulars, and the defendant objected to the evidence descriptive of the note, on the ground of a material and fatal variance.

In a prosecution for theft, the property alleged to have been stolen must be described with substantial accuracy, so that its identity shall be unquestionable and the defendant thereby protected from another prosecution for the same offence. We think that it was reasonably done, and that the defendant who wrongfully took the note and destroyed it should not be permitted to say it was not described with the utmost particularity. There is nothing in the circumstances which indicates any danger of his being subjected to another prosecution by reason of such incomplete description, and the attorney for the State has carefully inserted in one of the counts in the information the usual averment in such cases, that a more particular description of the property was to him unknown.

A similar objection was taken to evidence showing the precise form of the indorsements of the note by the payee and indorsee, on the ground that the information did not state the *form* of the indorsement by the payee, or that the indorsee who was the owner had indorsed it at all. Sufficient was alleged to show that the title passed by indorsement from the payee to the indorsee, and as the latter was alleged to be the owner, the question whether he had written his name on it by way of a blank indorsement without delivery could not in this case be material. The question was one of title, and his placing his name for the purpose of collection on the back of a note payable to his order would not affect that, and as a matter of mere technical form was unimportant.

3. A large number of objections are taken to the instructions given by the court to the jury. Those relating to the question of variance between the information and the proof are sufficiently noticed and disposed of in what has been already said with reference to the admissibility of the evidence on those points. The other questions made relate to the value and ownership of the note, the manner it was taken by the defendant, and the intent with which it was done. The jury were required to find, under the instructions given them, that the note was of some substantial value; that W. was the owner of it when it was taken by the defendant; that the taking was either secretly done, or openly, by fraud or force, and in either mode, with the felonious intent to deprive the owner of his

property in it, and convert it to the private advantage of the defendant. On all these points the law was fully, plainly and correctly stated, and the defendant has no just reason for complaint.

We advise the Superior court that a new trial be not granted.

In this opinion FOSTER and PARDEE, J. J., concurred; CARPENTER, J., also concurred. PARK, C. J., dissented.

STATE v. DOPEKE.

(68 Mo., 208.)

LARCENY.—A coffin, in which a body is interred, is the property of the person who furnished it for burial.

The value of an article stolen is to be fixed by its intrinsic value or market price, not by what it is worth to its owner; the term value is to be taken in its legal sense.

Case sufficiently stated in the opinion of the court.

HENRY, J. It is conceded by counsel for appellant, and fully established by the authorities, that a coffin in which the remains of a human being were interred was a subject of levy at common law. It is contended, however, that section 11, 12, 13 and 14, of our act concerning crime and punishments (Wag. Statutes, page 500, 501), "stand in lieu of the common law as it existed in reference to the question under consideration, and that the acts, alleged to have been committed by the defendant in this case, amount to nothing more than a statutory misdemeanor." Section eleven provides a punishment for removing the remains of a human being from the grave or

other place of interment. Section twelve makes it a misdemeanor for any one to receive such remains, knowing them to have been disinterred contrary to the provisions of the preceding section. These sections, it might be contended with plausibility, have superseded the common law in regard to the exhumation of the remains, but have no bearing upon the question of stealing a coffin or grave-clothes.

It was not larceny, at common law, to take a dead body from its place of interment, under any circumstances, but it was a misdemeanor, and as section eleven and twelve expressly provide a punishment for that offense, as also for receiving the dead body, those sections may be taken to stand in lieu of the common law in relation to the removal of the remains of the dead.

Section thirteen provides that "every person who shall open the grave or other place of interment, or sepulchre, with intent to remove the dead body or remains of any human being, for any of the purposes specified in section eleven of this chapter, or to steal the coffin, or any vestment or other article, or any part thereof, interred with such body, shall, on conviction," etc.

This section provides a punishment for an attempt to remove the remains or to steal the coffin or any article interred with the body. There is no enactment in regard to stealing a coffin, and with what propriety can it be said that the legislature, having prescribed a punishment for one offense which was punishable at common law, has thereby repealed the common law in regard to a different and higher grade of offense? By the common law it was larceny to steal a coffin in which the remains of a human being were interred. It was at common law, also, a misdemeanor to attempt to commit the offense, and the argument urged here is, that inasmuch as our legislature has provided a punishment for the misdemeanor, it has thereby entirely superseded and abolished the common law as the felony. We may not appreciate the force of the argument, but it comes far short of securing our assent to the proposition. That the stealing of a coffin is still larceny in this State is recognized in section thirteen, wherein it provides a punishment for the attempt to steal a coffin. We, therefore, conclude that, notwithstanding the enactment of those sections,

a coffin in which the remains of a human body are interred is still a subject of larceny in this State.

It is insisted that the indictment is defective in failing to negative the exceptions contained in section fourteen. This question has been otherwise determined by repeated decisions of this court, and recently in the State v. O'Gorman, ante, p. 179.

The coffin was alleged, in the indictment, to be the property of one Makel, a son-in-law of the accused, and it is contended that when he had the body interred he parted with all the property he had in the coffin, and that, therefore, the conviction of defendant cannot be sustained. Roscoe, in his work on criminal evidence, says: "A shroud stolen from the corpse must be laid to be the property of the executor, or of whoever else buried the deceased:" Page 604 (6th Am. ed.); 1 Chitty Crim. Law (5 Am. ed.), 44; 1 Hawkins P. C., 144, 148; Sharswood Black., 4th vol., 235. All these authorities, it is true, speak only of shrouds and ornaments buried with the dead, but the principle upon which these may be alleged to be the property of the executor, or of the person who buried the deceased, will certainly sustain an allegation that the coffin is the property of the person who buried the deceased.

The court, for the State, instructed the jury that if they found that the coffin was of less value than ten dollars, and that the defendant stole it, they should convict him of petit larceny.

By another instruction they were told that to convict defendant of grand larceny, they should find the coffin to have been of the value of ten dollars or more, and that it was sufficient if they found it to be of that value to the owner, and that it was not required that it should be of that value to third persons, or that it would command that price in the open market. This latter instruction was erroneous. The authorities, cited to support the doctrine it announced, give it no countenance. In 3 Greenleaf's Evidence, page 140, sec. 153, the author says: "Nor is it necessary to prove the value of the goods stolen, except in prosecuting under statutes which made the value material either in constituting the offense or in awarding the punishment. But the goods must be shown to be of some

value, at least, to the owner, such as reissuable bankers' notes, or other notes completely executed, but not delivered or put into circulation, though to third persons they might be worthless." It is clear that in the latter clause he was speaking of other prosecutions than those under statutes which make the value material either in constituting the offense or awarding the punishment.

"By the English law, as it stood when this country was settled, larceny was divided into grand and petit; the former being committed where the goods stolen were over twelve pence in value, the latter where they were of the value of twelve pence or under." Bishop's Crim. Law, vol. 1, sec. 679.

"In these valuations, says East, the valuation ought to be reasonable; for when the statute of West, 1, c. 15, was made, silver was but 20d. an ounce, and at the time Lord Coke wrote, it was worth 5s., and is now higher." 2d East's P. C., 736. So Lord Coke, 2 Inst., 189, says: "The things stolen are to be reasonably valued, for the ounce of silver at the making of this act was at the value of 20d., and now it is at the value of 5s., and above."

See also Black. Com., vol. 4, 237. The statute of Westminster 1, chapter 15, referred to by the authors, was that by which the distinction betwixt grand and petit larceny was made.

By statutes seven and eight, George IV., chapter 29, section 2, that distinction was abolished and every larceny, without regard to the value of the goods, was made grand larceny: Sharswood's Blackstone, vol. 4, 230. When it is said by elementary writers, and in adjudged cases, that in order to constitute the offense of larceny it is sufficient if the thing stolen be of some value to the owner, however small, although to third persons worthless, the observations relate to the offense of petit larceny, or to simple larceny, under the statute seven and eight George IV., and similar statutes, and are wholly inapplicable to grand larceny.

Where a distinction is made by statute between that and petit larceny, based upon the value of the goods stolen, the remarks of East and Lord Coke, above quoted, show conclusively that the value of the goods was to be measured by the current coin

of the realm, and that the cash value was that to be ascertained in determining whether the theft was grand or petit larceny.

If the criterion of the value, given by the court in the record of the above instructions be correct, one might be convicted of grand larceny for stealing a finger ring of the intrinsic or market value of five dollars, only, because forsooth, being a gift to the owner, by a departed friend, or wife, or other loved one, he placed an estimate upon it far beyond its value, although of no greater value to third persons than any other ring of the same kind which could be purchased wherever kept for sale for five dollars.

The criterion of value by which the jury were told in that instruction, that they might be governed, does no apply, as a general rule, in civil proceedings, and when the statutes requires that property stolen shall be of the value of ten dollars, in order to constitute the theft thereof grand larceny, the term "value" is to be taken in its legal sense, which does not differ from its common acceptation, and there is no warrant for allowing any other mode of ascertaining the value of stolen property in a criminal prosecution than that which prevails generally in civil proceedings.

If one sue another for the conversion of personal property, he recovers, not what the property was worth to him, but its value in the market; and it would be strange enough if, where the statutes declares that no one shall be adjudged guilty of grand larceny unless the goods were of the value of ten dollars, a criterion of value should be adopted which would authorize a conviction for that offence. When the goods stolen are worthless to third persons, and of no market value, but possess a value which can only be measured by fancy or sentiment—a measure of value as uncertain and variable as the whims and caprices of the owner of the goods, or the witnesses he may introduce to prove their value.

We cannot substitute this for the stable and certain measure furnished by the price which such goods command in the market.

In some civil cases, we are aware, the jury are allowed to consider *pretium affectionis* in estimating the value of property; but the reason for the departure from the general rule in

those cases does not apply in a prosecution for stealing such property.

The purpose of the prosecution is to punish the theft, not to compensate the owner of the property for his loss.

The judgment of the Court of Appeals is reversed, and the cause remanded. All concur.

Reversed.

WARE v. STATE.

(2 Texas Ct. App., 547.)

LARCENY.—Where several stolen articles are alleged to be of an aggregate value, it is necessary to show the theft of all the articles alleged to have been stolen, in order to convict.

ECTOR, P. J. The defendant was indicted, tried, and convicted, in the district court of Marion county, for theft, and his punishment assessed at seven years in the penitentiary. He filed motions for a new trial and in arrest of judgment, which were overruled, and he has taken an appeal to this court.

The defendant assigns the overruling of his motion in arrest of judgment by the lower court. The following is a copy of defendant's motion in arrest of judgment, viz.:

"Now comes the defendant and moves the court to arrest the judgment against him in the case, because the bill of indictment against him in this case is fatally defective, because the property alleged to have been stolen is not sufficiently described to enable the defendant to plead the judgment against him in this case in bar of another prosecution for the same offence, and for defects apparent on the face of the indictment."

We will give below the charging part of the indictment, which is as follows:

"That on the twenty-third day of January, in the year of our Lord one thousand eight hundred and seventy-seven, in

the county of Marion, and State aforesaid, one Charles Ware, late of said county, did unlawfully, feloniously and fraudulently, and without the consent of the owner thereof, take, steal, and carry away from and out of the possession of one Adeline Williams, three dresses, a more specified description whereof is to the grand jurors unknown, three underskirts, three quilts, two matrasses, one blanket, two pillows, two pillow-slips, two pairs of drawers, one pair slippers, six dresses, six underskirts, six drawers, children's clothing, six books, six plates, one coffee-pot, and one accordian, a more specific description of said articles being to the grand jurors unknown, and said articles being then and there of the aggregate value of thirty-five dollars, the corporal personal property of Adeline Williams, with the unlawful and fraudulent intent of him the said Charles Ware, to deprive the owner of the value of the same, and to appropriate it to the use and benefit of him, the said person taking the same," etc.

We believe that the property alleged to be stolen is sufficiently described in the indictment. "The certainty required in the indictment is such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offence." Pasc. Dig., Art. 2865.

The indictment in this case is for the theft of several articles of the aggregate value of $35.

It is sufficient to allege such aggregate value; it is not absolutely necessary that the separate value of each article be set out; but, to convict upon such indictment, it has been decided by our supreme court that the testimony must show the theft of all the articles alleged to have been stolen. Thompson v. The State, 43 Texas, 268.

The evidence in this case clearly shows that all the articles mentioned in the indictment were stolen, and that they are of the aggregate value of $35. The property in the indictment, charged to have been stolen by defendant, is described as the property of Adeline Williams. The evidence is that she is a married woman; that she had been abandoned by her husband for two or three years; that she did not know where her husband was; and that since her separation he had not contributed

to her support; and she testified that the stolen property was her property.

The ownership of the property was sufficiently alleged. Even if it had been community property between her and her husband (which was not the case), the ownership, under the circumstances, might properly have been alleged to be in the wife. Our supreme court has said, in the case of Ann Barta Lodge v. Liverton, 42 Texas, 18, it is not an open question in this court that the wife, when forced by the action of the husband to assume and fulfil the duties of a *femme solé*, or the head of the family, may exercise the rights and privileges of such position." See, also, the case of Fullerton v. Doyle, 18 Texas. We find no error committed in the lower court on the trial of the cause. The evidence abundantly supports the verdict and judgment.

The judgment is affirmed.

R. v. CHERRY.

Oxford Lent Ass. 1781, and East. term 1781.

(2 East P. C., 556)

LARCENY.—In order to constitute larceny, the felon must for the instant, at least, have the entire possession of the thing alleged to have been taken.

William Cherry was indicted for stealing a wrapper and some pieces of linen cloth; and it appeared that the linen was packed up in the wrapper in the common form of a long square, which was laid length-way in a wagon. That the prisoner set up the wrapper on one end in the wagon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose; but was appre-

hended before he had taken anything. All the judges agreed that this was no larceny; although his intention to steal was manifest. For a carrying away, in order to constitute felony, must be a removal of the goods from the place where they were, and the felon must, for the instant at least, have the entire and absolute possession of them.

Note.—In the conference upon Cherry's case above reported, Eyre B. mentioned a case before him, where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter. A thief took up the goods and carried them towards the door as far as the string would permit, and was then stopped: this he held not to be a severance, and consequently no felony. 2 East P. C., 556.

In Wilkinson's case, 1 Hale, 508; 2 East P. C., 556. One had his keys tied to the strings of his purse in his pocket, which Elizabeth Wilkinson attempted to take from him, and was detected with the purse in her hand; but the strings of the purse still hung to the owner's pocket by means of the keys. This was ruled to be no asportation; the purse could not be said to be carried away, for it still remained fastened to the place where it was before.

R. v. Thompson.

Reserved for the Opinion of the Judges at Easter Term, 1788.

(2 East P. C., 505.)

Larceny from the Person.—A master of a vessel asleep in his cabin is within the protection of the act.

John Thompson was indicted for privately stealing from the person of Jonathan Simpson, without his knowledge, a silver watch. The property was proved to have been taken by the

prisoner from the person of the prosecutor, a master of a ship then lying in the river Tyne, whilst he was asleep in his cabin, privately and without his knowledge. He was convicted, and HEATH, J., passed sentence of death upon him. But the counsel for the prosecution very candidly producing a case decided at Durham some years before, wherein it was ruled that the statute did not extend to persons asleep, the case was reserved for the opinion of the judges. Upon the consultation at this time the cases which I have before mentioned were quoted and considered; but five judges held the conviction to be proper against the other four; the case was adjourned to Hil. T. 1787, and again to Easter term succeeding, when all the judges agreed that the conviction was proper.

COMMONWEALTH v. LOUISA LUCKIS.

(99 Mass., 431.)

LARCENY FROM THE PERSON.—The indictment charged an attempt to steal a pocket-book from the person, the evidence showed that a police officer, seeing the defendant put her hand into the pocket of another woman, grasped the wrist of the hand; and that the defendant then raised her hand in the air with the pocket, and let it fall again suddenly, tearing the pocket, when the pocket-book fell to the ground. *Held*, a conviction was right.

Indictment for an attempt to commit larceny of a pocket-book from the person of a woman unknown. Trial in the superior court, before VOSE, J., who allowed a bill of exceptions, in substance as follows: The only witness for the Commonwealth was a police officer, the material part of whose testimony was this: "I saw the defendant put her left hand into the pocket of an old lady. I stepped forward and caught her

by the left wrist while her hand was in the pocket. She immediately raised her hand in the air with the dress, her hand being still in the pocket, and my hand still upon the defendant's hand; and bringing her hand down again suddenly, tore the dress and pocket to the ground. The pocket-book dropped to the ground. She said, 'Let go my hand. Who are you? Are you an officer?' I told her I was, and that she must go with me. The pocket-book dropped after the dress and pocket had been torn." There was no evidence that the defendant placed her hand upon the pocket-book. The witnesses also testified to other facts tending to show the guilt of the defendant.

The defendant offered no evidence, but asked the judge to instruct the jury "that, on the evidence as given on the part of the Commonwealth, there was a sufficient caption and asportation to constitute larceny, and so the indictment was not supported; that any movement made by the defendant to alter the position of the pocket-book of the party named in the indictment, with a view to take it away, was a sufficient asportation, and that no manual taking was necessary." The judge declined so to rule, and instructed the jury, "that if they were satisfied, beyond a reasonable doubt, that the hand of the defendant had been thrust into the woman's pocket with a felonious intent, and was arrested in the pocket while attempting to execute that intent, and before her hand had reached or disturbed the woman's pocket-book, they might find her guilty of the offence charged in the indictment; that any alteration in the position of the pocket-book in the woman's pocket, caused by the struggle between the defendant and the officer, the pocket-book not having been nor being in the defendant's hand, or in contact with it, would not be such a caption or asportation as to constitute the offence of larceny instead of the offence charged; but that if the defendant's hand had reached or seized the pocket-book, before it was arrested by the officer, or during the struggle, and she altered the position of the pocket-book in the attempt to secure or retain it, this would be such a caption or asportation as would make it their duty to acquit the defendant."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

F. F. Heard, for the defendant, cited Rex v. Thompson, 1 Grov., 78; Regina v. Simpson, Dearsly, 421; 2 Russell on Crime (4th Eng. ed.), 359.

C. Allen, Attorney General, for the Commonwealth.

COLT, J. The defendant, waving all objections to the form of the indictment, relies now only upon alleged errors in the rulings and instructions of the court upon the evidence.

The case shows an attempt manifested by an act, which was the beginning of a larceny, the completion of which was interrupted by an intervening circumstance not within the control of the prisoner. To justify a conviction, it was necessary to show that she failed in the perpetration, or was prevented in the execution of the offence of stealing from the person,—an offence which could only be complete when the property sought to be taken was in the full custody and control of the defendant. It is not indeed necessary that the pocket-book of the prosecutor should have been removed from the pocket, if once within the grasp of the thief, to constitute larceny. Rex v. Thompson, 1 Mood., 78. But the prisoner must for an instant at least have had perfect control of the property. There was nothing in the evidence reported which would justify the court in instructing the jury that there was such instantaneous caption and asportation in this case. Nor is there any evidence to which the last part of the instructions asked could be applied. It was not until after the hand was seized by the officer, and after all intention to commit any larceny must have been abandoned, that the pocket-book fell from the pocket in the struggle which ensued.

There was no error in the instructions given, or in refusing those asked.

Exceptions overruled.

KING v. STATE.

(54 Ga., 184.)

LARCENY FROM THE PERSON.—Simple larceny and larceny from the person are two distinct offenses; and evidence which establishes a larceny from the person will not sustain a conviction of simple larceny.

The case is sufficiently stated in the opinion.

WARNER, C. J. The defendant was indicted for the offence of "simple larceny," under the 4406th section of the code, and charged with having wrongfully, fraudulently and privately taken and carried away, with intent to steal the same, certain described United States national currency notes, of the value of twelve dollars. The evidence upon the trial proved a technical "larceny from the person." The jury, under the charge of the court, found the defendant guilty.

A motion was made for a new trial, on the ground that the court erred in charging the jury that they could find the defendant guilty of simple larceny, as defined by the 4406th section of the code, notwithstanding the evidence showed that it was a technical larceny from *the person*. The court overruled the motion, and the defendant excepted.

By the 4406th section of the code, it is declared that if any person shall take and carry away any bond, note, bank bill or due bill, or paper or papers, securing the payment of money, etc., with intent to steal the same, such person shall be guilty of simple larceny. By the 4410th section, theft or larceny from the person is defined to be the wrongful and fraudulent

taking of money, goods, chattels or effects, or any article of value from the person of another privately, without his knowledge, in any place whatever, with intent to steal the same.

"Simple larceny" and "larceny from the person" are two distinct offences under the code. It is true that if any person shall take and carry away any bond, note, bank bill, etc., with intent to steal the same, such person is guilty of simple larceny, and it is also true that if any person shall wrongfully and fraudulently take and carry away the personal goods of another, other than bonds, notes, bank bills, etc., with intent to steal the same, he would be guilty of simple larceny, but it does not follow that if bonds, notes, bank bills, etc., are taken from *the person* of another privately and without his knowledge, that the party defendant so taking the same may be indicted and punished for the offense of simple larceny. If one should take and carry away a box of jewelry, with intent to steal the same, he would be guilty of simple larceny; but if one should take a box of jewelry from *the person* of another, privately, without his knowledge, with intent to steal the same, he would be guilty of larceny from the person. So in this case, if the defendant had not taken the currency bills from *the person* of another privately, and without his knowledge, he might have been indicted and punished for the offense of simple larceny; but as the evidence shows that he was guilty of larceny from *the person*, he should have been indicted and punished for that offense.

Simple larceny and larceny from the person, as before remarked, are two distinct offenses, and the punishment is different. Simple larceny of currency notes, under the 4406th section of the code, is punished as felony by imprisonment in the penitentiary for not less than one year nor longer than four years, whereas, strange as it may appear, larceny from *the person* of currency notes is only punishable as a misdemeanor under the provisions of the act of 1866, reducing certain crime below felonies. The result, therefore, is in relation to the case now before us, that the defendant has been indicted and found guilty of a felony, for which he may be punished by imprisonment in the penitentiary for not less than one year nor longer than four years, when if he had been indicted for lar-

ceny from *the person*, the offense of which it is admitted the evidence proved him to have been guilty, he could only have been punished, as the law now stands, as for a misdemeanor. It might be a *convenient way* to indict the defendant for simple larceny and punish him as for a *felony* under the 4406th section of the code, when the evidence proved he was guilty of larceny from the person, and could only be punished therefor as for a misdemeanor. The simple objection to this course of proceeding is, that the penal laws of the state do not authorize it. There are four distinct classes of larceny recognized by the penal code of this state: 1st, simple larceny; 2d, larceny from the person; 3d, larceny from the house; 4th, larceny after a trust or confidence has been delegated or reposed. Code, § 392.

If any person shall steal currency notes, or other *choses* in action, or any article of value from the person of another, privately, without his knowledge, in any place whatever, such person is guilty of the offence of larceny from *the person*, and should be indicted therefor and punished as prescribed by law for that offence. If any person shall steal and carry away currency notes, or other valuable things as described in section 4406, *otherwise than from the person of another*, such person is guilty of simple larceny, and should be indicted therefor, and punished as prescribed by law for the offence. Penal laws are to be construed *strictly*, therefore the defendant in this case could not legally have been convicted and punished for the offense of simple larceny, under the 4406th section of the code, which is a felony, when the evidence clearly proved that he was only guilty of the offense of larceny from the person, which is not a felony, but a misdemeanor. The offense of a misdemeanor under the law cannot be converted into a *felony* and punished as such, in *that way*, without a violation of the fundamental principles of the penal laws of the state. In our judgment the court erred in overruling the defendant's motion for a new trial.

Let the judgment of the court below be reversed.

FLYNN v. STATE.

(42 Texas, 301.)

LARCENY FROM THE PERSON.—The offense is complete when the property is taken into possession; it is not necessary to show a removal of the property.

The case is sufficiently stated in the opinion.

DEVINS, J. The appellant, with James Anderson and George Wheeler, was jointly indicted for theft from the person of Nicholas Walsh. The charge was dismissed as to Anderson, the defendant Flynn alone being tried. The jury found him guilty, and assessed his punishment at five years in the penitentiary.

The errors assigned are, that the charge of the court was contrary to law, and that it misled the jury; that the court erred in refusing the charge asked by defendant; that the verdict of the jury was not warranted by the evidence, and that the court erred in overruling the motion for a new trial.

The charge of the court was clear, concise, and embraced the law applicable to the case; it directed the mind of the jury to the law, which had reference only to the facts in evidence; it was quite as favorable to the accused as the evidence demanded, or the law permitted. We find no error in the charge. The refusal of the court to give the instructions asked for defendant was, under the facts of the case and the law, a proper exercise of discretion. The evidence, uncontradicted, shows that while appellant's co-defendant and associate

(Wheeler) was "jostling against him (Walsh), and impeding his exit from the crowd at the theater, appellant forced his hand into Walsh's pocket, took the pocket-book into his hand, and drew it half way out of the pocket, when the owner, feeling the movement, turned suddenly around, and, with an angry exclamation, disconcerted the accused, who then made his escape; the witness stating further that he resisted defendant's going away with the book, as well as he could, on finding him withdraw it. The accused was indicted under article 762 of the Criminal Code. Article 763 defines the necessary requisites to constitute the offence.

1st. A theft from the person.

2d. The commission of the theft without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away; and

3d. "It is only necessary that the property stolen should have gone into the possession of the thief; it need not be carried away in order to complete the offence." In the present case it was taken from the person, from the place where the owner had deposited it.

4th. While Walsh was annoyed and his attention attracted by Wheeler, the defendant (in the language of the code) privately took into his possession the pocket-book, and without the knowledge of the owner.

5th. The evidence shows he had, or held it in his hand, had removed it half out of the pocket—a sufficient possession, within the letter and spirit of the code, of property so small and portable as the article taken. The provision in article 763, which dispenses with the necessity of proving the carrying away of property stolen from the person, and which makes the mere going into the possession of the thief, of such property, sufficient proof, justified the court in refusing the instruction asked.

The object of the framers of the code, in prescribing the same punishment for theft from the person and theft from a house, was evidently to give to the property of the person the same degree of protection as is given to property in a house; in the last case it is not necessary to show a removal of the

property charged to have been taken from the house; the reason of the rule is quite as strong when applied to property on the person, and the code has removed doubt on this subject by declaring the offense complete when the property charged to have been stolen is taken into the possession of the person charged with the theft. That the offense is complete when the property is taken into possession, was so held in a case decided during the late session at Tyler, where a party attempted to steal money during the night from clothing of a companion with whom he was traveling.

The evidence sustains the verdict, and there was no error in overruling the motion for a new trial.

Affirmed.

WATKINS v. STATE.

(2 Texas, Ct. App. 73.)

LARCENY.—Recent possession of stolen property is not of itself sufficient to justify a conviction; it is merely a fact to be considered by the jury.

The case is sufficiently stated in the opinion.

WINKLER, J. The judgment rendered in this case at the last term of this court at this place was, on motion of the attorney general, set aside, a rehearing granted, and the cause continued. The judgment of conviction had, must now be reversed and the cause remanded, because of a material error in the charge of the court, when taken in connection with all the evidence. This error is found in the third paragraph of of the charge, and is as follows:

"3d. When a person is found in possession of property recently stolen, such person is held accountable for the theft, unless he can explain how he came to have the stolen property in his possession. In other words, it is made obligatory upon the person having the stolen property in possession to rebut the presumption of guilt thus ensuing by proof."

The true rule is correctly quoted in the opinion of the supreme court of Texas, delivered by Mr. Justice Gould, in McCoy v. The State, 44 Texas, at page 618, as follows:

"The possession of property recently stolen is merely a fact or circumstance to be considered by the jury, in connection with all the other evidence submitted to them, in determining the guilt or innocence of the possessor;" citing Perry v. The State, 41 Texas, 484, and authorities there cited; Calvin Thompson v. The State, 43 Texas, 268; Yates v. The State, 37 Texas, 202; 2 Bishop's Cr. Proc.

This rule has been followed by this court in the following cases: Hannah v. The State, 1 Texas, Ct. of App. 578; and Massey v. State, 1 Texas, Ct. of App. 563.

In this case this charge must necessarily have influenced the jury to the prejudice of the accused; and, on this account, the judgment is reversed and the cause remanded.

Reversed and remanded.

NOTE.—In Truax v. State, 12 Texas, Ct. of App. 230, it was held that possession of property recently stolen was not of itself sufficient to justify a conviction for the theft thereof.

PEOPLE v. NOREGEA.

(48 Cal., 123.)

LARCENY.—Recent possession of stolen property is not of itself sufficient to justify a conviction.

The case is sufficiently stated in the opinion.

RHODES, J. The defendant was convicted of grand larceny for the stealing of a horse. The only evidence of defendant's guilt was, that the stolen horse was found in his possession a few hours after it was taken. People v. Chambers, 18 Cal., 382, and People v. Ah Ki, 20 id., 178, hold that the possession of stolen property is a circumstance to be considered by the jury, but it is not of itself sufficient to warrant a conviction. It is said by Greenleaf, 3 Greenl. Ev., sec. 31: "It will be necessary for the prosecutor to add the proof of other circumstances indicative of guilt, in order to render the naked possession of a thing available towards a conviction."

The evidence disclosed no circumstances of that character. The riding of the horse several miles beyond the point where he was first seen in possession of it, is only his continued possession of it, and is not a further circumstance indicative of guilt. The leaving of the saddle with the innkeeper does not tend to prove a larceny of the horse.

There may be an abundance of authority to sustain the point of the attorney general, that the court erred in excluding evidence as to the defendant's confession, after the preliminary evidence as to its having been voluntary; but the point does not arise in the defendant's appeal.

Judgment reversed, and cause remanded for a new trial.

Remittitur forthwith.

SMITH v. STATE.

(58 Ind., 340.)

LARCENY.—The presumption arising from the possession of stolen property is an inference of fact merely, and not a rule of law.

The case is sufficiently stated in the opinion of the court.

NIBLACK, J. The appellant, Edward Smith, was jointly indicted in the court below with one John W. Sterne.

The indictment was in two counts: the first for burglary, and the second for grand larceny.

The first count charged that the defendants, Smith and Sterne, on the eighth day of April, 1877, in the night time, feloniously and burglariously entered the store-house of one Theophilus Wright, with intent to steal, take and carry away the goods and chattels of him, the said Wright.

The second count charged the stealing, at the same time and place, of certain articles of the personal property of the said Wright, of the aggregate value of near twenty dollars, amongst which were two pocket-knives, of the value of one dollar each.

Smith, on a separate trial, was found guilty of burglary, as charged in the first count, and, over a motion for a new trial, was sentenced to imprisonment in the state prison for three years.

On the trial Sterne testified as a witness for the state, and, amongst other things, stated that he and Smith, with two other persons assisting them, entered the store-house of the said Wright, on the night charged in the indictment, being a Sun-

day night, and carried away the personal property enumerated in the second count of the indictment; that he took one of the pocket-knives, and that Smith took the other, which was a white-handled knife.

Wright testified that on Tuesday afternoon, after he lost the goods, Smith took him to one side and intimated that he, Smith, knew where the goods were secreted, speaking, at the same time, of Sterne as the person who had the custody of them.

W. H. Evans testified that five or six days after the burglary Smith exhibited to him a white-handled pocket-knife, which he, Smith, said had come from Wright's store, and which he claimed to have obtained from one of the parties implicated in the burglary; that Smith claimed that he exhibited this knife to show that he had found out and knew all about the burglary, because of a previous promise to Evans to try and find out about it.

Thomas J. Statt, who was present when the knife was exhibited, substantially corroborated Evans.

There was also evidence tending to show that, in the mean time, Smith claimed to other persons to be in communication with, or to have some knowledge of, the persons who committed the burglary, and that he was seen, the Sunday following the burglary, with Sterne, at the barn where a portion of the goods were concealed.

Two witnesses testified to having played cards all night with Smith, at some distance away from the scene of the burglary, and to other circumstances tending to establish an alibi on the part of Smith. Another witness testified to some admissions of Sterne while in jail, conflicting with his statements while on the witness stand, implicating Smith with the burglary. Four or five witnesses also testified to the bad character of Sterne for truth.

At the proper time the court gave to the jury several instructions in writing. In instruction, known as number four, the court, in substance, said that it is charged that the defendant broke and entered the store-house, with the felonious intent to steal, take and carry away the goods and chattels of Theophilus Wright.

"If you find that the defendant broke and entered the store-house, and are satisfied from the evidence, beyond a reasonable doubt, that the defendant did feloniously steal, take and carry away the personal goods of said Wright from said store-house, at the time the same was broken and entered, then the jury would have the right to presume that it was his intention to steal such goods when he broke and entered the store-house."

By instruction, known as number seven, the court further said to the jury: "If you should believe it to be true that the goods mentioned, or some portion of them, were stolen from Theophilus Wright, about the time charged in the indictment, and that shortly after that time they, or some portion of them, were found in the exclusive possession of the defendant, such possession imposes upon the defendant the duty and burden of explaining his possession; and if he has failed to satisfactorily account as to how he came by the stolen property, or has given a false account of how he came into possession of such stolen property, the law presumes that the defendant stole such property, and the presumption may be strong enough to justify you in finding the defendant guilty of larceny."

Although the appellant was convicted of the burglary, and not of the larceny charged in the indictment, yet the course of the trial, including the instructions given by the court, made the question as to whether the defendant had been guilty of larceny in connection with the burglary, a material one.

The appellant has devoted the greater portion of his brief to an argument to show that the court erred in giving instruction number seven, as above quoted. While the doctrine of this instruction may seem to be in substantial accord with some of the authorities which have fallen under our observation, we are of the opinion that it laid down a harsher rule than can be supported by the weight of modern authority.

In 3 Greenleaf's Evidence, sec. 31, it is said: "We have heretofore adverted to the possession of the instruments or of the fruits of a crime as affording ground to presume the guilt of a possessor; but, on this subject, no certain rule can be laid down of universal application, the presumption being not conclusive, but disputable, and, therefore, to be dealt with by the jury alone as a mere inference of fact. Its force and value

will depend on several considerations. In the first place, if the fact of possession stands alone, wholly unconnected with any other circumstances, its value or persuasive power is very slight, for the real criminal may have artfully placed the article in the possession or upon the premises of an innocent person, the better to conceal his own guilt. * * * It will be necessary, therefore, for the prosecutor to add the proof of other circumstances indicative of guilt in order to render the naked possession of the thing available towards a conviction:" 2 Russ. Crimes, p. 337; Curtis v. The State, 6 Cold., 9; The State v. Brady, 27 Iowa 126; The State v. Creson, 38 Mo., 372; The State v. Merrick, 19 Maine, 398; The State v. Floyd, 15 Mo., 349; Smaltery v. The State, 46 Ind., 447; Turbeville v. The State, 42 Ind., 490. In a prosecution for larceny, the fact that the stolen property is found upon the person of the defendant can always be given in evidence against him, but the strength of the presumption which it raises against the accused depends upon all the circumstances surrounding the case: Engleman v. The State, 2 Ind., 91. In the case of The State v. Hodge, 50 N. H., 510, a leading and well considered case, the supreme court of New Hampshire decided that the presumption thus raised was one of fact and not of law; that there is no legal rule on the subject; that much depends on the nature of the property stolen, and the circumstances of each particular case; that "it is a presumption established by no legal rule, ascertained by no legal test, defined by no legal terms, measured by no legal standard, bounded by no legal limits. It has none of the characteristics of law. Whether it be found by the judge or the jury, the judge and the jury must be equally unconscious of finding in it any semblance of a legal principle, however much good sense may appear in the result arrived at. Being a presumption of fact, it should, according to our practice, be drawn by the jury and not by the court."

We regard this case as well supported by authority, and we feel it our duty to apply the doctrines enunciated by it to the case at bar.

We think the court erred in saying to the jury, as it did in substance, in the absence of a satisfactory explanation of the possession of the stolen property, the *law presumes* that the

defendant had stolen it—such presumption being in reference of fact merely, and not amounting to a rule of law.

Evidence in explanation of such possession may fall short of a satisfactory explanation, and yet be sufficient to acquit. If it creates a reasonable doubt, it practically rebuts the presumption of guilt: Clakner v. The State, 33 Ind., 412; Wag. v. The State, 35 Ind., 409.

The judgment is reversed, and the cause remanded for a new trial. The clerk will give the proper notice for the return of the prisoner.

State v. Walker.

(41 Iowa, 217.)

Larceny.—Recent possession of stolen property, unaccounted for, is a strong presumption, or *prima facia* evidence, of guilt.

The question of recent possession is one of fact, for the jury, unless the court decides, as a matter of law, that the possession is not recent.

Miller, C. J. The court, among other instructions to the jury, charged as follows:

If you find that the store of the witnesses, S. E. & John Johnson, was burglariously entered, about the night of the 3d of February, 1873, and a large quantity and variety of goods stolen therefrom, and that the following June different portions and varieties of the same goods were found in the premises of the accused, and you further find that the defendant has been unable to give any reasonable explanation of how he came by such possession, then such facts should be regarded by the jury as raising a strong presumption that the defendant was himself guilty of feloniously taking the property."

This instruction is erroneous. The rule is well settled that the *recent* possession of stolen property, unaccounted for, is a strong presumption or *prima facie* evidence, of guilt. Warren v. The State, 1 G. Greene, 106; The State v. Taylor, 25 Iowa, 273; The State v. Brady, 27 id., 126; Jones v. The People, 12 Ill., 259; Commonwealth v. Millard, 1 Mass., 6; 3 Greenl. Ev., §§ 31, 32 and 33.

What is to be termed *recent* possession depends very much upon the character of the goods stolen. If they are such as pass readily from hand to hand, the possession, in order to raise a presumption of guilt, should be much more recent than if they were of a class of property that circulated more slowly, or is really transmitted.

There may be cases where the possession is so long after the commission of the crime that a court will refuse to submit the question to the jury, deciding, as a matter of law, that the possession is not recent, but in all other cases the question is one of fact, to be submitted to the jury. See Rex v. Partridge, 7 Car. & P., 551; The State v. Bennett, 3 Brev., 514; The State v. Jones, 3 Dev. & Bat., 122; Rex v. Adams, 3 Car. & P., 600; Regina v. Cruttenden, 6 Jur., 267; Commonwealth v. Montgomery, 11 Mite., 534; Engleman v. The State, 2 Ind., 91; Price v. The State, 846.

The instruction was erroneous, in that it directed the jury that, as a matter of law, proof of possession of part of the stolen goods, four months after the commission of the crime, was recent possession, from which a strong presumption of guilt arose, unless the possession was satisfactorily explained. The judgment must, therefore, be reversed, and a new trial ordered.

Reversed.

WEBB v. THE STATE.

(8 Texas, Ct. of App. 115.)

LARCENY.—The possession of other stolen property, besides that described in the indictment, may be shown.

Generally a defendant cannot make evidence for himself by showing his own declarations.

Where one is being tried for theft, it is error to admit proof of a separate and independent larceny.

The appellant and his brother were charged with the theft of a mare, belonging to one Hines, on the 20th day of January, 1879. On the application of Sam Webb, a severance was granted; other facts are sufficiently stated in the opinion.

WINKLER, J. On the trial below, the appellant, having severed from his co-defendant, and being alone on trial for the theft of one of two animals which appear to have been stolen from the same immediate neighborhood in Lamar county, and about the same time counsel for the state, it seems from the record, not having direct and positive evidence of the guilt of the defendant, had resort to circumstantial testimony in order to procure a conviction. In pursuance of this line of procedure, proof was adduced tending to show that the two persons jointly indicted for the the theft of one of the animals, alleged to have been stolen in Lamar county, were seen together at Ennis, in Ellis county, a distance of some one hundred and forty miles from the scene of the theft, and soon after the perpetration of the theft; the two men being in possession of the two animals taken from Lamar county. At this stage of the

evidence, the counsel for the state offered to prove that the two defendants, when on their return from Ellis to Lamar, were seen in possession of certain horses other than the one mentioned in the indictment, which the county attorney proposed to prove had been stolen by the defendants in Ellis county. This testimony was objected to by the defendant's counsel as irrelevant and inadmissible. The objection was overruled and the testimony was admitted, apparently on the ground that the supposed theft in Lamar county, and that committed in Ellis county, were parts of one transaction.

The rule where one accused of crime is found in possession of the fruits of the crime, as evidence conducing to establish his guilt, seems to be as follows: The force and value of such testimony will depend on several considerations. If the facts of possession stand alone, wholly unconnected with any other circumstances, its value or persuasive power, it is said, is very slight, and, agreeably to Mr. Greenleaf, it will be necessary for the prosecution to add the proof of other circumstances indicative of guilt in order to make the naked possession of the thing available towards a conviction: 3 Greenl. on Ev., sec. 31. Various examples are given in the books of such circumstances naturally calculated to awaken suspicion, and to corroborate the inference of guilt arising from the fact of possession, and among them is the fact that he was possessed of other stolen property. See the section from 3 Greenleaf cited above.

The fact that such proof would be admissible for the purpose of corroborating the fact of possession of the property averred to have been stolen, would apply if the other stolen property was found in the possession of the alleged thief at the time he is found in the possession of the property he is accused of stealing. So, if it had been shown that, at the time the defendant and his confederate were found in the possession of the horse for the theft of which they, or either, were prosecuted (that charged to have been stolen in Lamar county), they had also been found in possession of other property, the horses alleged to have been stolen in Ellis county, the testimony would have been admissible. As the case was developed, however, it seems that the theft committed in Lamar county and that committed in Ellis county, were not, as the judge seems

to have supposed, parts of one transaction, but two separate transactions; and therefore the testimony of a different transaction than the one charged in the indictment should have been excluded from the jury, either at the time it was first offered, or when the defendant moved the court to exclude it after it had been admitted over his objection. Testimony of this nature, it is true, is sometimes admitted when *scientur*, or guilty intent, is the subject of inquiry: Francis v. The State, 7 Texas, Ct. App. 501; but it was not offered for such purpose in the present case.

It is shown by a bill of exceptions that the defendant offered to prove certain statements made by the defendants prior to their trip to Ellis county, going to show the motive and object they had in going from Lamar to Ellis county, which they claim was an innocent intention. This testimomy was not part of the transaction; it was mere hearsay, and clearly inadmissible, and the court did not err in excluding it from the jury.

Among other things, the court charged the jury as follows: "The fact that one charged with theft is found in possession of stolen property is not alone sufficient to authorize a conviction, but this fact is a circumstance to be considered by the jury in determining the guilt or innocence of the accused; and if this, in connection with other facts and circumstances in evidence, satisfies the minds of the jury, beyond a reasonable doubt, that the accused is the guilty party, they should find a verdict of guilty." The defect in this charge is that it assumes as a fact that the defendant was found in the possession of the animal alleged to have been stolen. This charge is an expression of opinion as to the weight of evidence, and is violative of article 677 of the Code of Criminal Procedure.

We are of opinion there was error in admitting proof of a separate and independent theft, and that the court, whilst usually careful and accurate in its charges, in the charge set out above gave the jury an improper charge, likely to have been applied by the jury to the prejudice of defendant. For these errors, the judgment must be reversed and a new trial allowed.

Reversed and remanded.

NOTE.—In Taylor v. State, 13 Texas Ct. of App., 205, the defendant was charged with the larceny of a cow. It was held that evidence of the possession of other cattle alleged to have been stolen was admissible only to establish the identity of the herd in which the stolen animal was found.

In People v. Cauiff, 2 Parker's C. R., 586.

JAMES J., upon this point says: "Proof that stolen goods were found upon the person of the prisoner, or in his house or possession, is presumptive evidence against him of having stolen them, and sufficient to call upon him to explain his possession; but before any such presumption can arise, the goods found upon the accused must be shown to have been stolen. No presumption of guilt can arise from the bare possession of property, and no man is called upon to explain his possession of property, until it is proved that it was stolen."

SCHLINGER, ET AL., v. THE PEOPLE.

(102 Ill., 241.)

LARCENY.—Recent possession of stolen property is sufficient to warrant a conviction, unless the attending circumstances so far overcome the presumption thus raised as to create a reasonable doubt.

A prisoner can not voluntarily absent himself at the moment the verdict is rendered, and take advantage of his absence to avoid judgment upon the verdict.

Opinion of witness as to mere matters of fact is not admissible.

Newly discovered cumulative evidence not always ground for a new trial.

Writ of Error to the Criminal Court of Cook county.

Mr. Thomas Shirley, for the plaintiff in error.

Mr. James McCartney, Attorney General for the People.

The facts are sufficiently stated in the opinion.

Mr. Chief Justice CRAIG delivered the opinion of the court: This was an indictment against Henry Schlinger and Samuel

Schlinger, for larceny and burglary. The indictment contained four counts. The first count charged larceny of a certain quantity of cloth, the property of Alfred Hitchcock. The second count charged defendants with receiving stolen goods knowingly. The third count charged burglary of the same goods from the same person, with force, on the 1st day of April, 1880. The fourth count is like the third, except the burglary was charged with force, and on April 1st, 1880. On a trial before a jury the defendant was found guilty in manner and form as charged in the indictment. The value of the stolen property was found to be $318, and the term of imprisonment of defendant, Henry Schlinger, fixed at seven years in the penitentiary, and the other defendant ten years. The court overruled a motion for a new trial and in arrest of judgment, and rendered judgment on the verdict.

It will be observed that the jury returned a general verdict of guilty, in manner and form as charged in the indictment, and as the third count of the indictment was bad, it is urged that the judgment on the verdict is erroneous. The indictment contains three good counts, and under the uniform ruling of this court the judgment was proper and regular, although the indictment contained one bad count. Townsend v. The People, 3 Scam., 326; Holliday v. The People, 4 Gilm., 111; Lyons v. The People, 68 Ill., 272.

It is next urged that the court erred in giving instruction number one for the People, which was as follows:

"The jury are instructed, as a matter of law, that possession of stolen property, immediately after the theft, is sufficient to warrant a conviction, unless attending circumstances or other evidence so far overcomes the presumption thus raised as to create a reasonable doubt of prisoner's guilt, when an acquittal should follow."

The law is well settled that recent possession of stolen property, in no manner explained by the prisoner, will warrant a conviction. As was said in Comfort v. The People, 54 Ill., 404: "The books agree that a recent possession of stolen property after the theft is sufficient to warrant a conviction, unless the attending circumstances or other evidence so far overcomes the presumption thus raised as to create a reasonable doubt of

the prisoner's guilt." The instruction does not seem to conflict in any manner with the doctrine announced in the case cited, but seems to be in entire harmony with the rule there announced, which is fully sustained by the authorities. We perceive no substantial objection to the instruction, and do not believe the jury were in any manner misled by it.

It is also contended that the last instruction given for the People is erroneous. It is as follows:

"The jury are instructed, as a matter of law, that their verdict should extend also to the case of the defendant, Samuel Schlinger, though he is not now present in court."

It appears from the record that this case was called for trial May 11, 1881, and a default was taken against Samuel Schlinger, who was not then present. A jury was called and sworn to answer questions, when an adjournment was had until the following day. On May 12th, when court opened, as appears from the record, all the defendants appeared, and a jury was empanneled to try all of the defendants. On May 13th all the defendants were present, but on May 14th, when the trial was concluded and the instructions given, it appears that Samuel was absent. On the motion for a new trial, the defendant read an affidavit of one Rosa Memlick, from which it appears that he came to her house on the afternoon of the last day of the trial, and was taken sick while there. The defendant, however, although he filed his own affidavit on another subject, does not undertake to give any excuse for leaving the court while the trial was in progress, nor does he give any reason for his absence. The question presented by the instruction is, whether a defendant in a criminal case can stop the progress of a trial, and thus defeat the ends of justice, by deserting the court room during the last hours of a trial, or has the court the power to proceed and finish the trial in the absence of a defendant?

In Holliday v. The People, 4 Gilm., 111, which was an indictment for procuring an abortion, where the verdict was received in the absence of the defendant, it was held, according to the principles of the common law, in all capital cases, the verdict must be received in open court, and in the presence of the prisoner; but that rule did not apply to a misdemeanor.

No opinion was, however, expressed in regard to what was the proper rule in cases of felony. There is no doubt but a prisoner on trial for a felony has a right to be present at every step taken in his case, and it would be error for the court to deprive him of that right without his consent, unless it might become necessary to remove him from the court room, temporarily, for disorderly conduct; but where a prisoner, after a trial has begun, wrongfully and voluntarily abandons the court room, and refuses to appear, he must be regarded as having waived a right which is guaranteed to him, if he sees proper to avail himself of it, and the court is under no obligations to stop the trial until the defendant thinks proper to return, but in such a case the court would not transcend any of its legitimate powers by proceeding with the case to final judgment. The constitutional right of a prisoner to appear and defend in person and by counsel, to demand the nature and cause of the accusation, to meet the witnesses face to face, was conferred for the protection and the benefit of one accused of a crime, but, like many other rights, no reason is perceived why it may not be waived by the prisoner. He may, if he sees proper, waive any trial, and plead guilty to an indictment. If he may do this, he may waive the right to cross-examine a witness, or to be present when his case is argued to the jury, or when the verdict is received.

A similar question arose in Wilson v. The State, 2 O. S., 319, where it is said: "The remaining error assigned is, that the verdict was received in the absence of the defendant below. If he had been in prison, or had been prevented by improper means from being present when the verdict was rendered, we should regard this as a fatal error."

In Ross v. State, 20 Ohio, 33, it was held that it was the right of the prisoner to be present at the time the verdict was rendered, and if deprived of this right by imprisonment, or any other improper manner, the verdict should not be followed by judgment. But the defendant was not imprisoned, nor was he prevented by any improper means from being present at the rendition of the verdict. He was at large on his own recognizance, and presumed to be present if he kept it. He can not, in such a case as the present, voluntarily absent him-

self at the moment the verdict is rendered, and take advantage of that absence to avoid judgment upon the verdict. What was said in the case cited applies here. The defendant was not imprisoned, nor was he prevented by any improper means from being present when the verdict was rendered. He voluntarily and wrongfully absented himself, and he can not now claim any advantage on acccount of such absence. It was the duty of defendant to be present when the case was submitted to the jury, and when the verdict was returned, but he can not claim any advantage from a failure to observe the duty, when he was absent of his own accord. Hill v. The State, 17 Wis., 697. He can not be permitted to take advantage of his own wrongs, and thus defeat the ends of justice. It was the defendant's own fault that he was not present when the verdict was rendered. The defendant's voluntary abandonment of the trial must be regarded as a waiver of the right to be present when the verdict was returned into court.

It is also urged that the court erred in the modification of certain instructions; but what the modification was, and in what the error consisted, has not been pointed out, and we are unable to determine, from an inspection of the record, whether any error occurred in this regard or not. If any serious objections existed to the modification of the instructions, they should have been pointed out in the argument.

It is contended that the court erred in refusing to allow the witness Hitchcock, on cross-examination, to state the names of the house in Baltimore of whom he purchased goods. Much latitude is often given in the cross-examination of witnesses, especially where it appears that the witness is attempting to evade or conceal the truth, but the witness, Hitchcock, seemed to be perfectly fair, and endeavored to tell the truth fully and fairly, and we are at a loss to perceive how the names of the firms of whom the witness purchased goods could throw any light on the question of the guilt or innocence of the defendants.

It is also claimed that the court erred in refusing to permit the defence to ask the witness, Annie Schlinger, whether defendants were away from the house on the night of the larceny, from the time they went in until she went to bed. Upon an

examination of the record, it will be found that this witness testified very fully on the subject. She says, in substance, that the defendants were not away from the house that evening, and went to bed at ten o'clock. She was further asked if defendants were away from the house as much as half an hour. To this she replied, not that she knew of. She was then asked, could they have been gone that time without her knowing it. This question the court decided was improper, and we think properly, as the witness had detailed fully all she knew on the subject. The answer would be a mere matter of opinion of the witness. Other objections of a similar character have been made to the ruling of the court on questions of evidence, but we do not find any of them well taken.

It is also claimed that a new trial should have been granted, because of newly discovered evidence. The newly discovered evidence is that of one John T. Simins. He states that he knows who stole the goods in question, and that the defendants are innocent; that he saw the goods in a certain room in Chicago after they were stolen, and went with the goods, when they were taken from Chicago, as far as De Kalb, Illinois. This evidence, had it been before the jury, could not be regarded as decisive. The rule adopted in this State is, that a new trial will seldom be granted to let in newly discovered cumulative evidence, and then only when it seems to be decisive in its nature. Sulzer v. Yott, 57 Ill., 164. This evidence is not of that character. If the affidavit of the proposed witness be true, it is apparent that he himself was a party to the crime, and had been a witness before the jury, his evidence, when weighed in connection with the other evidence in the case, could not have turned the scales in the defendant's favor.

After a careful examination of the whole record, we fail to find any substantial error. The judgment will be affirmed.

Judgment affirmed.

NOTE.—To the point that possession of property recently stolen is presumptive evidence of guilt, see Waters v. People, p. 153.

STATE v. GRAVES.

(72 N. C., 482.)

LARCENY.—Where goods are stolen, one found in possession so soon thereafter, that he could not have reasonably got the possession unless he had stolen them himself, the law presumes he was the thief.

The above rule has been reduced to very narrow proportions, and is never applicable when it is necessary to resort to other evidence to support the conclusion.

INDICTMENT FOR BURGLARY, tried before KERR, J., at December term, 1874, Gilford Superior Court.

The case is sufficiently stated in the opinion.

PEARSON, C. J. The fact that the "watch and chain" were found in the possession of the prisoner at Danville, on the Monday after the burglary, on Saturday night preceding, at Greensboro, connected with the fact that he was offering to dispose of the articles at much less than their value, and made contradictory statements as to how he got them, were matters tending to show either that the prisoner was the man who broke and entered the dwelling house and stole the watch and chain, or else that he had received the goods, knowing them to have been stolen. These facts, taken in connection with the evidence of the mysterious movements of Jim Edwell and Jennie Stevens, about the premises on the night of the burglary, were fit subjects for the consideration of the jury.

His honor committed manifest error in taking the case from the jury and ruling that "if the jury believe from the evi-

dence that the prisoner was in possession of the watch and chain in Danville, on the Monday after the watch and chain were stolen on Saturday night, in Greensboro, *the law presumed he was the thief*, and had stolen the watch and chain, and that the prisoner was bound to explain satisfactorily how he came by the goods." The rule is this: "Where goods are stolen, one found in possession so soon thereafter, that he could *not have reasonably got the possession unless* he had stolen them himself, *the law presumes he was the thief*."

This is simply a deduction of common sense, and when the fact is so plain that there can be no mistake about it, our courts follow the practice in England, where the judge is allowed to express his opinion as to the weight of the evidence, have adopted it as a rule of law, which the judge is at liberty to act on, notwithstanding the statute, which forbids a judge from intimating an opinion as to the weight of the evidence. But this rule, like that of *falsum in uno, falsum in omnibus*, and the presumption of fraud, as a *matter of law*, from certain fiduciary relations, see Pearce v. Lea, 68 N. C., 90, has been reduced to very narrow proportions, and is never applicable when it is necessary to resort to other evidences to support the conclusion; in other words, the fact of guilt must be *self-evidence* from the *bare fact* of being found in the possession of the stolen goods, in order to justify the judge in laying it down, as a presumption made by the law, otherwise it is a case depending on circumstantial evidence, to be passed on by the jury.

In our case, so far from the fact of guilt, to wit: that the prisoner broke and entered the house and stole the watch and chain, being self-evident, it is a matter which, under the circumstances proved, admits of grave doubt, for it may well be that the prisoner merely received the watch and chain after some one else had committed the burglary, which would change the grade of the crime very materially. As the case goes back for another trial, it is a matter for the solicitor of the state to consider whether it will not be well to send a new bill containing other counts to meet the different aspects of the case, as it may be looked upon by the jury.

Venire de novo.

COMMONWEALTH v. TITUS.

(116 Mass., 42.)

LARCENY BY FINDER OF LOST GOODS.—Where the finder of lost goods, at the time of taking them into his possession, knows, or has reasonable means of knowing, who the owner is, but intends at the time to appropriate them to his own use, he may be convicted of larceny. But if he has no felonious intent at the time of taking them into his possession, a subsequent conversion of them to his own use will not constitute larceny.

GRAY, C. J. The rulings and instructions at the trial were quite as favorable to the defendant as the great weight, if not the unanimous concurrence, of the cases cited on either side as the argument would warrant.

The finder of lost goods may lawfully take them into his possession, and if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. But if, at the time of first taking them into his possession, he has a felonious intent to appropriate them to his own use, and to deprive the owner of them, and then knows or has the reasonable means of knowing or ascertaining, by marks on the goods or otherwise, who the owner is, he may be found guilty of larceny.

It was argued for the defendant that it would not be sufficient that he might reasonably have ascertained who the owner was; that he must at least have known at the time of taking the goods that he had reasonable means of ascertaining that fact. But the instruction given did not require the jury to be satisfied merely that the defendant might reasonably have

ascertained it, but that at the time of the original taking he either knew, or had reasonable means of knowing or ascertaing, who the owner was. Such a finding would clearly imply that he had such means within his own knowledge, as well as within his own possession or reach at that time.

It was further argued that evidence of each of the defendants, subsequent to the original finding and taking, was wrongly admitted, because such acts might have been the result of a purpose subsequently formed. But the evidence of the subsequent acts and declarations of the defendant was offered and admitted, as the bill of exceptions distinctly states, for the single purpose of proving, so far as it tended to do so, the intent with which the defendant originally took the property into his possession at the time of finding it. And the bill of exceptions does not state what the acts and declarations admitted in evidence were, and consequently does not show that any of them had a tendency to prove that intent, nor indeed that any acts were proved except such as accompanied and gave significance to distinct admissions of the intent with which the defendant originally took the goods.

Exceptions overruled.

PEOPLE v. SWAN.

(1 Parker, C. R. 9.)

LARCENY BY FINDER OF LOST GOODS.—If the finder of lost goods, at the time of taking them into his possession, knows, or has the reasonable means of knowing or ascertaining, who the owner is, but intends at the time to appropriate them to his own use, and deprive the owner of them, he may be found guilty of larceny.

The indictment charged the prisoner with the larceny of a pocket-book, containing one hundred dollars in money, the property of Alonzo Howland.

From the evidence it appeared that the prosecutor entered a *necessary*, on a call of nature, and left the pocket-book and money on the bench or seat, forgetting it when he came out. In a short time he missed it, and upon his return it was gone. The prisoner absconded, was followed to Albany, and found with the pocket-book and part of the money in his possession. The pocket-book also contained papers bearing the name of the owner. The prisoner stated to the arresting officer that he knew from the papers it contained that it belonged to the prosecutor; that if he got another pocket-book the officer would not get it so easily.

For the prisoner, it was insisted that the prisoner was the *bona fide* finder of lost property, and could not be convicted of larceny by a fraudulent conversion.

WILLARD, Circuit Judge. It has been said that if a man *lose goods*, and another find them, *and not knowing* the owner, converts them to his own use, it is no larceny. This rule supposes that the finder acts *bona fide*, is ignorant of the owner, and may, therefore, have a warrantable ground to suppose that the goods will never be claimed, and the owner will never be discovered. Such seems to have been the view of the supreme court in the case of The People v. Anderson, (*a*) cited by the prisoner's counsel. The particulars of the case are not detailed, but it assumes that the owner had lost the goods, and that the defendant was an honest finder.

The law, however, clearly holds a prisoner guilty *criminally*, who, *knowing the owner*, converts the property to his own use. It is the duty of the finder to restore property which he has found, to the rightful owner, and if there are marks upon it, by which the owner can be ascertained, or if he has reasonable grounds to believe who the owner is, he will be guilty of larceny if he converts it to his own use.

In the present case, the pocket-book and money can not be said to have been lost, in the strict technical sense of the term.

(*a*) People v. Anderson, 14 J. R., 294.

The prosecutor left it by accident for a few minutes in an unusual place, but knew where it was left. If the prisoner, when he discovered it, had no reasonable ground to believe that it had been abandoned by the owner, or that its owner never would be found; if he knew whose property it was, before he converted it to his own use; if he took no means to restore it to its owner, but on the contrary fled and endeavored to conceal it, and appropriated it to his own use, the jury will be warranted in finding him guilty.

The jury found the prisoner guilty, and he was sentenced to the state prison for three years and six months.

NOTE.—In State v. Weston, 9 Conn., 527, there was evidence to the effect that the prisoner found a pocket-book containing money, on the highway, with the owner's name legibly written in two places in the pocket-book. The following instruction was held correct: "If the defendant found the pocket-book and bank bills as claimed by him, and knowing or having the means of knowing the owner, concealed them and converted them to his own use, instead of giving notice thereof to the owner, he was a thief, and ought to be found guilty."

In Hunt v. Com., 13 Grat. (Va.), 757, the court said: "To constitute larceny, in the finding of goods actually lost, it is not enough that the party has general means, by the use of proper diligence, of discovering the true owner. He must know the owner at the time of the finding, or the goods must have some mark about them, understood by him, or presumably known by him, by which the owner can be ascertained. And he must appropriate them at the time of finding with intent to take entire dominion over them."

In People v. Cogdell, 1 Hill., N. Y., 94, it was held that in order to convict the finder of lost property, as for a larceny, he must know who the owner is, at the time he acquires possession, or have the means of identifying him *instanter*, by marks then about the property which the finder understands. It is not enough that he has general *means of discovering the owner* by honest diligence, etc.

In Taylor v. People, Breese, (1 Ill.,) 227, it was held that larceny could not be committed of goods and chattels found in the highway, where there are no marks by which the owner can be ascertained.

In People v. Kaatz, 3 Parker C. R., 129, it was held the rule that larceny could not be committed of goods accidentally lost, and of which the finder really supposes that the owner could not be ascertained, does not apply to cattle which have strayed from the enclosure of the owner upon the public highway.

PEOPLE v. CAMPBELL.

(4 Parker C. R., 386.)

LARCENY. A statute, declaring all personal property the subject of larceny, includes the property in a dog.

The case is sufficiently stated in the opinion.

RUSSELL, J. The defendant was indicted at the last March term of this court for grand larceny, in stealing, as averred, one dog of the value of $50, and one collar, of the value of $1, the property of Jeronomus S. Underhill. A demurrer to the indictment was argued before me at the last July term, on the ground that the stealing of a dog was not an offence by the law of this state. Accompanying the indictment was a stipulation that it be considered as alleging that the dog in question was reclaimed, and made tame and domestic; and that the defendant, knowing it to be such, feloniously took and carried it away; and, further, that the averment in the indictment as to the theft of the collar be deemed to have been omitted. The object was to present the question as though the indictment had been framed upon the simple, felonious taking of the dog. It is impossible for the court to consider this stipulation in deciding the question as to whether a dog is property so as to be the subject of larceny. If it should be determined that a dog is not the subject of such an offence, the indictment would stand for the collar, which would make it in effect an indictment for petit larceny. If it should be so determined, and the prosecution cannot support the charge

of stealing the collar, then, of course, the district attorney would *nol pros.* the indictment. No stipulation of this character can affect the structure of the indictment as it emanated from the grand jury. The charge, as made, being a felony, the constitution of this state requires the presentment or indictment of a grand jury as a pre-requisite to trial; and if the pleading they file with the court could be remodeled by stipulations between the counsel, the defendant would not be tried upon the presentment of the grand jury, but rather upon the consent of the counsel.

This court cannot acquire jurisdiction to try any offence by consent, nor can its jurisdiction over an offence be changed by consent so as to embrace any other than that presented by the grand jury, where the action of that body is requisite. If the form of an indictment does not suit a prosecuting officer, his only remedy is by reindicting. On the trial of an indictment, certain omissions can be disregarded by the court, 2 R. S., 728, 352; but unless the power is conferred by statute, or is warranted by the acknowledged rules of pleading, the court is not vested with it. The right does not extend to adding to or expunging from the indictment substantial allegations. In the case of Cancemi v. The People, 18 N. Y. R., 128, in which it was held that a prisoner could not consent to be tried by less that the constituted number (twelve) of jurors, STRONG, J., who delivered the judgment of the court of appeals, used this language: "There is obviously a wide and important distinction between civil suits and criminal prosecutions as to the right of a defendant to waive a strict, substantial adherence to the established constitutional statutory and common law mode and rule of judicial proceedings." The present indictment is a constitutional mode of proceeding, within the principle of this remark, and the defendant can waive no legal right by any consent he may give in reference to its important averments.

I have concluded to pass upon the question presented, and which was argued with ability on both sides, for the purpose of fixing the character of the indictment as to being one for grand or petit larceny.

At the common law, larceny could be committed of domestic cattle, i. e., sheep, oxen, horses, etc., or of domestic fowls, i. e.,

hens, ducks, geese, etc., because, according to Lord Hale, they were "under propriety," and served for food. So, as to beasts or birds, *feræ naturæ*, which were reclaimed and made tame or domestic, and served for food, i. e., deers, pheasants, partridges, etc., if the thief knew them to be tame. It could not be committed as to some things whereof the owner might have a lawful property, and "such whereupon he might maintain an action of trespass"—i. e., mastiffs, spaniels, greyhounds, bloodhounds, by reason, as Lord Hale says, of the baseness of their nature; nor of some things wild by nature, yet reclaimed by art or industry—i. e., bears, foxes, ferrets, etc., because they served not for food, but pleasure. 1 Hale's P. C., 510, 511. The same rules are stated in substance in 2 East, P. C., 607, 614, except as to dogs, because, when this author wrote, the statute 10 Geo. III., c. 18, was in force, making the stealing of dogs punishable upon a conviction before two justices. Blackstone repeats the same rules, 4 Bl. Com., 235, 236, and says that "dogs of all sorts, and other creatures kept for whim and pleasure, though man may have a sort of base property therein, and maintain a civil action for the loss of them, are not of such estimation as that the crime of stealing them amounts to larceny." If this author means to say that a civil action could be maintained for the value of dogs, if wrongfully taken, it is difficult to see why they were not within the protection of the criminal law at the time he wrote. It will be observed, too, that instead of using the term baseness in connection with the nature of dogs, he used it to stamp the kind of property which can be possessed or enjoyed in them.

As such part of the common law as formed the law of the Colony of New York on the 19th day of April, 1775, have been retained by the constitution of the state, subject to the power of the legislature to alter them, Const., art. 1, § 17, and as dogs were not the subject of larceny at the common law at that time, it is proper to consider whether the legislature has altered the common law in this particular. At common law the only description of property, which could be the subject of larceny, was "mere movables having an intrinsic value." Things savoring of the realty and written instruments were added by statutes. The People v. Loomis, 4 Denio, 380. The

statutes of this state have extended the law of larceny further than the English statutes did. *Id.* By the 2 R. S., 679, sec. 363, it is provided that "any person who shall be convicted of the felonious taking and carrying away the personal property of another, of the value of more than twenty-five dollars, shall be adjudged guilty of grand larceny," etc. "Personal property," as here used, is defined by a subsequent section, 2 R. S., 702, § 33, "to mean goods, chattels, effects, evidences of rights in action and all written instruments," etc.

Sections 64 and 65 increase the offence if committed in a dwelling house, or in a ship or other vessel, or if committed by stealing in the night-time from the person of another. Section 68 relates to the offence of severing produce from the soil of another, or property from the building of another, to the value of more than twenty-five dollars, which was not larceny at the common law. Sections 66 and 67 were intended rather to be rules of evidence than to serve to create or designate any distinct offences. They relate to written instruments, i. e., bonds, covenants, notes, bills of exchange, drafts, orders, receipts, lottery tickets, etc., and provide for ascertaining the value of such securities, or declare what shall be their value, if stolen, considered as the subject of larceny. They commence thus: "If the property stolen consist of any," etc., showing that the particular property referred to is "personal property," within section 63. Section 69 relates to the stealing of the records, etc., of courts of justice. Since the revised statutes went into operation, the legislature have made the offence of stealing railroad passenger tickets, before the sale thereof, or before being issued to the agents of the companies for sale, the subject of larceny. 3 R. S., 5th ed., 959, 960, §§ 75, 76, 77. This is a new crime, and would not have been the subject of larceny under The People v. Loomis, cited above. As the law stood, these tickets would have had no value until they had been issued by their respective companies.

As I understand section 63 of the statute, it is meant to define the offence of grand larceny in reference to personal property, and to declare that everything which is personal property, which can be, or is held or enjoyed as personal property, is within the protection of the statute. It appears as though the

legislature, instead of entering upon a minute statement of the kinds or species of personal property which could be the subject of larceny, designed that this section should be construed in the most comprehensive provision of the constitution of this state, that no person shall be "deprived of life, liberty or property, without due process of law." If the meaning of the term "property" can be ascertained in the latter case, the meaning of the terms "personal property" certainly can be in the former.

The provision of the constitution underwent judicial consideration in the case of Wynehamer v. The People, 3 Kern., 378. That case will be remembered as involving the constitutionality of the late law to prevent intemperance in this state, the court of appeals decided against the law. COMSTOCK, J., in his opinion, p. 396, used this language: "Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the law of society. In a state of nature property did not exist at all. Every man might then take to his use what he pleased, and retain it, if he had sufficient power; but when men entered into society, and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof proper laws were ordained." Tomlin Law Dic. "Property," 2 Bl. Com., 39.

"Material objects, therefore, are property in the true sense, because they are impressed by the law and usage of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched."

If what is or what is not property depends upon the law or usage of society, it would be impossible to say that the quality of the exclusive right of the owner to the use or enjoyment of his dog, his absolute power to sell and dispose of it, and the other characteristics and attributes of property, had not been impressed by the laws and usages upon that useful animal.

If property is a notion of society; if common consent is the basis of or requisite to its recognition or maintenance, for none of the brute creation could this principle be claimed with more propriety or truth than this one.

Assuming, then, that property is something which can be appropriated or donated to one's exclusive use or enjoyment; something which can be sold or otherwise disposed of at will; something, for a violation of our rights, in relation to which the law provides adequate remedies; something which it is not unlawful to hold, and which, therefore, the law is bound to guard us in the possession of, the inquiry arises, how are dogs looked upon or considered by the law?

In Putnam v. Payne, 13 John. R., 312, it was held that any person is justified in killing a ferocious and dangerous dog, which is permitted to run at large by its owner, or to escape through negligent keeping, the owner having notice of its vicious disposition. The action in the court below was to recover for the killing of a dog. The plaintiff had judgment; but the supreme court reversed the judgment, for the reason that, under the circumstances, the dog was properly killed. There was no question but what, if the dog had been improperly killed, the action would have been maintainable. This case concedes that there can be and is property in a dog. Whether absolute or qualified is immaterial; it is enough to satisfy our statute against the felonious taking of personal property, that there can be, or is any. In Hinckley v. Emerson, 4 Comst., 351, the right of property in a dog was expressly recognized. It was a similar action. The plaintiff, in the court below, proved the value of the dog to be ten or fifteen dollars, and had judgment, and the supreme court, on error, affirmed the judgment. The statute, allowing dogs attacking sheep to be killed, was referred to by the court as proof that but for the statute the right did not exist. In Bull v. Flagler, 23 Wend., 354, which was an action of trespass for killing a dog, it was held that, though under proper circumstances the killing of a dog was justifiable, a needless or wanton destruction of the animal, even to prevent an acknowledged mischief, would be unjustifiable.

It was also held that the opinions of witnesses as to the nature of a dog, for whose destruction an action was brought,

were admissible in evidence. In Dunlap v. Snyder, 17 Barb., S. C. R., 561, which was a similar action, the supreme court of the fourth district did not question the right to maintain an action for the improper killing of a dog. They reversed the judgments of the justice and county court, among other reasons, because the opinions of witnesses as to the value of the dog were received in evidence, thus rejecting upon that point the authority of the case of Bull v. Flagler. In Cowen's Justice, 4th ed., § 563, in treating "of actions for taking, detaining or injuring personal property," it is said, the terms "personal property," as used in the Code of Procedure, include money, goods, chattels, things in action and evidences of debt, and, with the exception of real estate, everything in which one can have a valuable interest, instancing, among other things, a dog. In section 538, it is said, "A man has such an ownership in a dog, a cat, or any wild animal, which he has acquired a property in by possession, that he may recover damages for any injury to it." From these authorities I conclude that, if an action can be brought to repossess one of a dog, of which he has been unlawfully deprived, or if, in case the dog has been killed, an action can be brought to recover its value, and if, on the trial, its value is matter of proof, as that of any other admitted item of property, even though in certain extreme cases the dog may legally forfeit its existence to a stranger against the will of its owner, nevertheless, that there are sufficient of the characteristics or attributes of property about it to make it a subject of protection within the statute defining grand larceny. In the People v. Maloney, 1 Parker Cr. R., 593, it was held, for the purposes of a writ of *habeas corpus*, that a dog was a subject of larceny. It is provided by statute, 2 R. S., 5th ed., 974, § 1, that a tax upon dogs shall be annually levied and collected in all the counties of this state, except the county of New York, and the statute fixes the rate of tax, and the mode in which it shall be collected. It is also similarly provided that any person may kill a dog which he shall see "chasing, worrying or wounding any sheep," unless it is done by the direction of the owner of the sheep, or his servant.

It is also provided that a justice of the peace may order the killing of any dog that shall attack a traveler on the highway,

or a horse attached to a carriage, or upon which any person shall be mounted; and that any person in possession of a dog, or who shall suffer it to remain about his house for the space of twenty days previous to the assessment of tax, or to any injury, as specified, done by the dog, shall be deemed its owner for all the purposes of the statute. The statute also imposes penalties where the owner refuses to kill a dog when legally directed or ordered to do so. I think these statutes demonstrate that the legislature meant to treat dogs as property, protecting and controlling them, so far as the public good or safety permits or justifies.

In the year 1857 a law was passed in this state providing for the "incorporation of associations for improving the breed of domestic animals." It declares that any corporation formed under it shall have power to raise, import, purchase, keep, breed and sell all kinds of domestic animals. Why are not dogs within the purview of this statute? Although not ranked among domestic animals in the time of or by Lord Hale, yet the estimation in which they have been since held by society shows they are no longer considered to be so base as not, on that account, at least, to be the subject of larceny.

If by domestic is meant "belonging to the house," who can deny this attribute to the dog? What animal more domestic? What one appreciates a home more, shows stronger attachments to it, or if it strays from it, is more certain to return to it? In some of its species it serves as a pet or a companion. In others, it assists and takes part in manly sports and recreation. In others, again, it is the faithful custodian and guardian of property. In none, it may be said, is it entirely divested of usefulness. When the benefits it confers are reflected upon, why is there not a perfect property in improving the breed of such an animal? If it comes within the description of domestic animals under this act of 1857, it is certainly property, the subject of larceny.

If the indictment in the present case should show that the dog in question was "reclaimed and made tame and domestic," and that the defendant, with a knowledge of this, stole the dog, which would seem to have been necessary at the common law in reference to animals *ferœ naturæ*, 2 East. P. C.,

607, it cannot be sustained in its present form. Under the view I entertain, this is not necessary. The indictment shows that the dog was the property of the prosecutor, that it had a certain value, and that it was feloniously taken from his possession. Whatever else must be proved on the trial can be proved under these averments.

If the court receives evidence it should not, under the indictment as drawn, the defendant can have his remedy by bill of exceptions.

My judgment is that the indictment is good as one for grand larceny, and judgment must be rendered for the People on the demurrer, with liberty to the defendant to plead to the indictment.

Judgment for plaintiff.

STATE v. LYMUS.

(26 Ohio St., 400.)

LARCENY.—At common law, a dog is not the subject of larceny.

REX, J. The defendant was indicted at the March term, 1872, of the court of common pleas of Logan county, for burglary.

The burglary consisted of breaking and entering a stable in the night season with intent to steal property of value contained therein, to wit, a dog found therein, the property of the owner of the stable, of the value of twenty-five dollars. The defendant moved to quash the indictment, on the ground that it did not charge him with the commission of an offence which was punishable by the criminal law of this state.

The court sustained the motion and ordered the defendant to be discharged, holding "that there is no law authorizing the

indictment, and that it does not charge a crime, offence, or misdemeanor."

The prosecuting attorney excepted to the ruling and decision of the court, and presented a bill of exceptions, embodying the indictment, motion, ruling and decision of the court, and the exceptions taken thereto, which was signed and sealed by the court, and made part of the record in the case.

The only question presented by the exceptions is: Is the stealing of a dog a crime in this state?

The property intended to be stolen by the burglar must be property of which a larceny may be committed. We have no statute that, in express terms, declares a dog to be the subject of larceny; but it is claimed that inasmuch as the right of property in dogs is protected by civil remedies, and as a recent statute of this state requires them to be listed for taxation, they are property, and, therefore, properly the subject of larceny. We do not think so. Neither the fact that the right of property in dogs is protected in this state by civil remedies, nor the fact that recent legislation requires them to be listed for taxation, has the effect of enlarging the operations of the statutes defining and punishing larceny.

At the common law, although it was not a crime to steal a dog, yet it was such an invasion of property as might amount to a civil injury, and be redressed by a civil action: 2 Chit. Black., 393, 394; 1 Bish. Cr. Law, 1080. In describing the property of which a larceny, either grand or petit, may be committed, the statutes of this state use the words "goods and chattels." These words at common law have a settled and well-defined meaning, and, when used in statutes defining larceny, are to be understood as meaning such goods and chattels as were esteemed at the common law to be the subject of larceny. As dogs, at the common law, were held not to be the subject of larceny, they are not included in the words "goods and chattels," as used in the statutes referred to.

Bonds, bills, notes, etc., are goods and chattels, and yet, as they were held not to be the subject of larceny at common law, it was deemed necessary to so enlarge the larceny statutes as to declare the stealing or malicious destruction of them punishable in the same manner, and to the same extent, as the larceny

of money, or other goods and chattels of the same value. So with dogs. It will be time enough for the courts to say that a dog is the subject of larceny when the law-making power of the state has so declared; "constructive crimes are odious and dangerous:" Findlay v. Bean, 8 Serg. and Rawle, 571.

We are, therefore, of opinion, that the court of common pleas did not err in the ruling and decision excepted to.

Exceptions overruled.

WHITE and MCILVAINE, JJ., concurred.

WELCH, C. J., and GILMORE, J., dissented.

NOTE.—In People v. Bradley, 4 Parker, C. R. 245, the defendant was charged with the larceny of "One receipt for the payment of the sum of fifteen dollars and forty-six cents, and of the value of fifteen dollars and forty-six cents, which said receipt was in the words and figures following, o wit: 'Buffalo, Mch. 3d, 1855. Received from Mr. E.W. Weston Fifteen $\frac{46}{100}$. dollars in full for bill of lumber, and of all demands to date. (Signed) Dart Brothers.'" The 2 R. S., p. 702, § 33, is as follows: "The term personal property, as used in this chapter, shall be construed to mean goods, chattels, effects, evidences of right in action, and all written instruments by which any pecuniary obligations, or any right or title to property, real or personal, shall be created, acknowledged, transferred, increased, defeated, discharged or diminished." CLINTON, J., among other things said: "There is nothing in the language which can be applied to a creditor's written acknowledgment of payment by his debtor. Such an acknowledgment, or receipt, is not an evidence of debt; no money is due thereon, nor can, in any contingency, be collected thereon, nor is any property transferred or affected thereby. But there are receipts known to commerce and the law, which are the subjects of larceny under our statutory definition. Such are 'accountable receipts,' or receipts for money to be accounted for; receipts for property in store, and ship receipts."

In State v. James, 58 N. H. 67, it was held that a printed list of names was a chattel, but not a "writing containing evidence of any existing debt" within the statutory definition of the subject of larceny. Its value, as a statutory subject of larceny, is its market value. To be of the value of $20, it must be capable of being sold for that sum, at a fairly conducted sale.

In State v. Pierson, 59 Iowa, 271, the defendant was charged with the larceny of a bank check. It was *held* a sufficient allegation of value to say that it was "of the value of $20.97," and that it was sufficient to describe the check, as a check, or order for the payment of money, giving the signer's name, owner, date, value, with time and place of payment.

In Mullaly v. People, 86 N. Y., 365, it was held that the term "personal property," as used in 2 N. Y. Rev. St., 703, § 333, concerning crime and punishment, included dogs.

In State v. Brown, 9 Baxter, (Tenn.) 53, it was held that the statutory term "goods and chattels" included dogs.

In State v. Doe, 79 Ind., 41, it was held that dogs were not the subject of larceny at common law, nor under the statute of larceny as "personal goods."

R. v. Leigh.

Well's Summer Assizes, 1800.

(2 East. P. C., 694.)

One who assists in taking another's goods from a fire in his presence, with no intent, at the time, to steal, will not be guilty of larceny for a subsequent conversion of them with a felonious intent.

Elizabeth Leigh was indicted at Wells assizes, in the summer of 1800, for stealing various articles, the property of Abraham Dyer. It appeared that the prosecutor's house, consisting of a shop, containing muslin and other articles mentioned in the indictment, was on fire, and that his neighbors had in general assisted at the time in removing his goods and stocks for their security. The prisoner probably had removed all the articles which she was charged with having stolen. It appeared that she removed some of the muslin, in the presence of the prosecutor and under his observation, though not by his desire. Upon the prosecutor's applying to her the next morning, she denied that she had any of the things belonging to him; whereupon he obtained a search warrant, and found his property in her house, most of the articles artfully concealed in various ways. The jury found her guilty; but it was suggested that she originally took the articles with an honest purpose, as her neighbors had done, and that she would

not otherwise have taken some of them in the presence and under the view of the prosecutor; and that therefore the case did not amount to felony.

The jury were instructed that, whether she took them originally with an honest intent was a question of fact for their consideration; that it did not necessarily follow from the circumstances mentioned that she took them with an honest intent. But even if they were of that opinion, yet that her afterwards hiding the goods in the various ways proved, and denying that she had them, in order to convert them to her own use, would still support the indictment. The jury found her guilty; but said, that in their opinion, when she first took the goods from the shop she had no evil intention, but that such evil intention came upon her afterwards. And upon reference to the judges in Michaelmas term, 1800, all (absent LAWRENCE, J.) held the conviction wrong; for if the original taking were not with intent to steal, the subsequent conversion was no felony, but a breach of trust.

WILLIAMS v. STATE.

(55 Ga., 391.)

LARCENY BY TRAPPING.—Where the owner, by himself or his agent, consents to the taking of property, and the person taking or receiving it not knowing him to be such owner or agent, but believing him to be another thief and confederate with himself in the supposed crime, the taking is not larceny, it being done with the owner's consent.

The case is sufficiently stated in the opinion.

BLECKLEY, J. 1. The bill of indictment was found by the grand jury, some of whom, after being drawn to serve at that

term of the court, had been dropped from the general list of persons qualified and liable to serve as jurors on a revision of the list by the proper officer. This was made a ground of motion to quash the bill. It was properly overruled for the reason that the revised list was made for the purpose of designating the names from which future juries were to be drawn, and had no relation whatever to the juries which had already been drawn to do duty at the next term of the court, the term at which the indictment was found. Any other construction would subject both the grand jury and the petit juries to a process of disintegration every time a revision of the general list takes place.

2. Another ground of motion to quash was, that the indictment, upon its face, by an entry at the close of it, purported to have been found at the October term, 1871. This, also, was properly overruled. This entry was not an essential part of the indictment, and giving that year, instead of the year 1874, was evidently a clerical error. The true date appeared on the minutes of the court, and was reproduced on the back of the indictment.

3. The trial proceeded, and the defendant was convicted. He was charged with stealing thirty pounds of seed cotton of the value of $1.00. It appeared in evidence that the cotton was on the owner's plantation, in the possession of his tenant or agent. The agent, during the day, reported to the owner that the defendant wanted to buy or get some cotton, and the owner replied, "Let him have it, and I will be there at the getting." That night the owner, with a party of friends armed with guns, concealed themselves near the cotton house. As testified by the owner, he was told, at the conversation in the day by his agent, that the defendant would be there that night to get the cotton. He also testified that, on taking his position at night, he called out his agent and asked where the defendant was. Being told that he was in the wood, about a quarter of a mile off, he directed the agent to go and tell him to come and get the cotton. The agent went, and, after a short absence, returned in company with defendant. Leaving the defendant at the cotton house, within a few steps of where the owner and his party lay concealed, the agent went to his dwel-

ing house, brought out a basket of cotton, delivered it to the defendant, who moved off with it, and just then the owner cried "halt," and his party discharged their guns in the air; the defendant dropped the basket, ran off in the darkness, and made his escape. The court charged the jury, in substance, that if the defendant and his associate in the transaction (the owner's agent) united in a common intent to steal the cotton, combined and confederating for that purpose, in executing the common intent, and one of them did the actual taking and carrying, they were both guilty. Also, that if the agent had no intent to steal, but the defendant believed he had, and so combined and confederated with him to steal, and the agent handed him the cotton, and he took it and removed it any distance whatever, he was guilty. There is no evidence in the record upon which to charge the defendant with any taking and carrying away done by his supposed accomplice. The evidence is clear that the person was in mental and moral concert with the owner, not with the accused. It is incredible that he was engaged in stealing during this transaction. There was no guilty taking or carrying done by him, and it was error for the court to make any charge based on that hypothesis. The defendant is responsible alone for such taking and carrying away as were done by himself. According to the evidence, the acts of the counterfeit accomplice proceeded from the joint will of himself and the accused. He, with the owner, was running on the line of detection and arrest. The accused had a supposed ally, but not a real one; he was running by himself, on the line of guilt and impunity. His pretended accomplice, being a person of sound memory and discretion, could do no act which would render the defendant guilty, for the former was making no effort to become guilty himself. He was, in fact, only a detective, not a thief.

4. The second proposition of the charges is equally erroneous when applied to the facts of this case. The evidence is clear and uncontradicted, that the cotton was delivered by the owner's agent. As testified by the latter, the owner said during the day, "Let him have it, and I will be there at the getting." As testified by the owner himself, he said, at night, "Go and tell him to come and get the cotton." Either of

these expressions might, without much strain, be construed into a direction on the part of the owner to deliver the cotton, and it was in fact delivered. There was no trespass committed in the taking. There was no taking without the owner's consent. True, the consent was given for a purpose quite aside from any design to part with the property; but, if given at all, and the intended larceny was cut off as soon as the owner could, after delivery, cry, halt, and fire off the guns, what taking was there which could, with any truth, be said to be without his consent? If the property was delivered by the owner's direction, and with his consent, it can make no difference, legally, although it does morally, that the accused did not know of such direction and consent. Suppose the owner, instead of acting by his agent, had acted in person, and delivered the cotton from his own hands, the defendant, not knowing him to be the owner, but believing him to be another thief and a confederate with himself in the supposed larceny, would not an essential element of legal larceny be wanting?

5. But were it even granted that the agent made delivery on his own motion, without the owner's consent, there was too much active participation by these two persons in this transaction for it to amount to larceny on the part of the accused. It seems to be settled law that traps may be set to catch the guilty, and the business of trapping has, with the sanction of courts, been carried pretty far. Opportunity to commit crime may, by design, be rendered the most complete, and if the accused embrace it he will still be criminal. Property may be left exposed for the express purpose that a suspected thief may commit himself by stealing it. The owner is not bound to take any measures for security. He may repose upon the law alone, and the law will not inquire into his motive for trusting it. But can the owner directly, through his agent, solicit the suspected party to come forward and commit the criminal act, and then complain of it as a crime, especially where the agent, to whom he has entrusted the conduct of the transaction, puts his own hand into the *corpus delicti*, and assists the accused to perform one or more of the acts necessary to constitute the offence? Should not the owner and his agent, after making everything ready and easy, wait passively

and let the would-be criminal perpetrate the offence for himself in each and every essential part of it? It would seem to us that this is the safe law, as well as the sounder morality, and we think it accords with the authorities: 2 Leach, 913; 2 East P. C., ch. 16, sec. 101, p. 666; 1 Car. & Mar., 218; Meigs, 86; 11 Humph., 320; Baily, 569.

It is difficult to see how a man may solicit another to commit a crime upon his property, and when the act to which he was invited has been done, be heard to say that he did not consent to it. In the present case, but for the owner's incitement, through his agent, the accused may have repented of the contemplated wickedness before it had developed into act. It may have stopped at sin without putting on the body of crime. To stimulate unlawful intentions, with the motive of bringing them to punishable maturity, is a dangerous practice. Much better is it to wait and see if they will not expire. Humanity is weak; even strong men are sometimes unprepared to cope with temptations and resist encouragement to evil.

Let the judgment be reversed.

MARTINEZ v. STATE.

(41 Texas, 126.)

LARCENY FROM HOUSE.—Stealing goods hanging outside of a store, on a piece of wood nailed to the door, is not larceny from a house.

Case sufficiently stated in the opinion.

REEVES, A. J. The only question in this case is presented in the brief for the state: "Is an indictment for theft from a house, sustained by proof that the stolen property was taken while hanging at and outside of the store door on a piece of

wood nailed to the door, facing and projecting towards the street."

Burglary at common law is an offence against the security of the habitation, the protection of the property being an incident, not the leading-object.

The precinct of the dwelling, the place where the occupier and his family reside, include only such buildings as were used with an appurtenant to it, and these only were the subject of burglary at common law, and to constitute the offence there must have been an actual or constructive breaking and entry into the house.

The English definition of burglary has been modified by statute in this and in other states, so as to include offences committed in the daytime as well as in the night, under certain circumstances, and in other buildings than the dwelling house. The idea of regarding the house as a place of security for the occupants, and a place of deposit for his goods, underlies all these statutes. By our code, burglary is constituted by entering a house by force, threats, or fraud at night, or, in like manner, by entering a house during the day and remaining concealed therein until night, with the intent in either case of committing a felony: Pas. Dig., art. 2359. It is not necessary that there should be any actual breaking, except when the entry is made in daytime. Arts. 2360, 2361.

The code provides different degrees of punishment for theft without regard to place. The article under which the defendant was indicted is as follows: "If any person shall steal property from a house in such a manner as that the offence does not come within the definition of burglary, he shall be punished by confinement in the penitentiary not less than two nor more than seven years." Art. 2408. Where the house entered is a dwelling house, the punishment for burglary is imprisonment in the penitentiary not less than three nor more than ten years. Where the house entered is not a dwelling house, the punishment is not less than two nor more than five years. In these cases the punishment is greater than that for theft in general, as defined by the code, where the property is under the value of twenty dollars.

We are of opinion that the goods were not under the pro-

tection of the house, so as to make the taking theft from a house in the meaning of the statute, and that the defendant was only liable to the punishment prescribed for simple theft.

The goods were not deposited in the house for safe custody, but the witness says they were hanging out to attract customers or purchasers.

The statutes of the states cited in the brief of counsel, in general, punish theft in a house, while other statutes referred to punish theft from a house as does our code, and they seem to use these terms as meaning the same thing. A different rule would not admit of any definite application.

A construction that would make the stealing of goods while exposed on the street, and not in the house, the same offence as stealing from the house, would be to lose sight of the distinction between different offences and the different grades of punishment, and would introduce a latitude of construction too uncertain to be followed in the administration of the criminal law.

The judgment is reversed and case remanded.

Reversed and remanded.

R. v. HARRISON.

(2 East P. C., 559.)

LARCENY. A person, taking property with the consent of the wife of the owner, will not be guilty of larceny.

Nathaniel Harrison was indicted for stealing some plate, and it appearing that the prosecutor's wife had the constant keeping of the key of the closet where the plate was usually locked up, and that the prisoner could not have taken it with-

out her privity and consent (which appeared probable from other circumstances, although no direct evidence of the fact could be produced), the court thinking that it might be presumed that he had received it from her, directed him to be acquitted, which was accordingly done.

Reg. v. Harrison.

(12 Cox C. C., 19.)

Larceny.—If a wife goes away with a man for the purpose of committing adultery, and takes with her her husband's property, and the adulterer either sell it or use it as his own, he will be guilty of larceny.

James Harrison was indicted for stealing one pony, cart and harness, on the 7th of November, 1870, the property of Charles Patrick.

Cooper, for the prosecution.

Reeve, for the prisoner.

Sarah Patrick, the wife of the prosecutor, deposed that on the 7th of November, 1870, she left her husband's home, taking the pony, cart and harness to drive and see her son, who was at a boarding school at Lynn. She knew the prisoner, and had arranged to meet him at Clench Walton, overtook him on the road, and subsequently went to Swaffham, where she spent the night in his company; went with him to East Derham, and afterwards to Norwich, where the prisoner sold the pony, cart and harness, without her consent or knowledge; she took the money and put it in her purse.

By Reeve: I knew the prisoner had pawned his watch for £1, and that we owed money for lodging. When the pony

and cart were sold, I gave the prisoner £1 out of the price to get his watch out of pawn, and that was all he had of the proceeds.

Samuel Greengrass proved that the prisoner offered the pony and cart for sale for £10, in the presence of the prosecutor's wife.

John Bere proved that he purchased the pony, cart and harness of the prisoner for £8 8s. The prosecutor's wife was not present, but he paid the money to her, and she did not object to the sale.

Reeve submitted that there was no case; the prisoner was only acting as the agent of the woman, and received no part of the proceeds except a sovereign, which he had expended.

LUSH, J., summing up the case to the jury, said: If you are satisfied that the prisoner knew, at the time he disposed of these articles, that they were the property of the woman's husband, then you must find him guilty. So long as a wife is living properly with her husband, if she give away his property, or sells it under ordinary circumstances, it would not be larceny; but if a wife goes away with a man for the purpose of committing adultery, and takes with her her husband's property, and the adulterer either sells it or uses it as his own, he will be guilty of larceny. In this case it was not clear that the prisoner knew at the time of the elopement that the wife had taken, or was about to take, her husband's cart; and if it had not been subsequently sold, there might have been a difficulty in the case. But was there any doubt that when the cart was sold the prisoner knew he was dealing with the husband's property? It had been said that the prisoner did not receive the proceeds; that the woman was obliged to sell it to provide herself with necessaries. But she had no authority then to deal with her husband's property, as she had not been turned away from home by him; the contention that the prisoner was merely acting as the agent of the woman would not be sufficient, as it appeared that in her absence he negotiated the sale and received part of the proceeds for defraying the expenses that

he and the woman had incurred while living in a state of adultery.

Guilty.

NOTE.—For further discussion of the question, how far a wife is liable for stealing the goods of her husband, and how far an adulterer may be guilty who aids and abets her, see State v. Banks, 48 Ind., 197; People v. Schyler, 6 Cowen, 572; Regina v. Featherstone, 26 Eng. L. & Eq. Rep., 570.

STEVENS v. THE STATE.

(44 Ind., 469.)

LARCENY.—Where the property stolen belongs to the wife of the alleged owner, there can be no conviction.

PETTET, J. This was an indictment against the appellant for larceny, charging her with stealing a shawl, the property of Clarence Roberts.

There was a verdict of guilty. A motion for a new trial, for the reason that the verdict is contrary to the evidence, was overruled, and an exception taken. The evidence clearly and unmistakably shows that the shawl was the property of Florence Roberts, wife of Clarence Roberts, and was given to her by her mother after marriage. When the law was that a husband owned all the personal property of his wife, this evidence, possibly, might have sustained the verdict, but under our statute and the rulings of this court, it cannot. Acts 1853, p. 57, sec. 5; 1 G. & H., 295, note 2; Scott v. Scott, 13 Ind., 225; Wilkins v. Miller, 9 Ind., 100; Martindale v. Tibbetts, 16 Ind., 200.

The judgment is reversed, with instructions to the court below to sustain the motion for a new trial. The clerk will certify this opinion at once.

NOTE. In Pratt v. State, 35 Ohio St., 514, it was held that under a statute making articles of clothing purchased by a wife with her separate means her own property, a conviction for larceny thereof could not be maintained under an indictment laying the property in her husband.

If a wife be guilty of larceny in company with her husband, both of them may be indicted; and if the husband be convicted, the wife should be acquitted. But if the husband be acquitted, and it appears that the felony was by her own voluntary acts (by which must be understood that the husband, if present, had no knowledge of or participation in the fact), she may upon the same indictment be convicted; for the charge is joint and several: 2 East P. C., 559.

In Quinlan v. People, 6 Parker C. R., 9, the defendant, Rosana Quinlan, together with her husband, was indicted for robbery. LEONARD, J., said: "If both were together, and nothing appeared to the contrary, the presumption would be that the wife acted under coercion, and she would then be entitled to an acquittal."

In Com. v. Wood, 97 Mass., 225, the defendant was indicted for keeping a tenement used as a house of ill-fame, resorted to for prostitution and lewdness. At the trial it was shown that the house belonged to the defendant's wife as her separate property; that she lived there and carried on the business, and that the defendant did not participate in the profits. For the prisoner it was contended that the tenement was owned by the wife as her separate property, and that the keeping a house of ill-fame is an offence peculiar to the female sex, and therefore an exception to the general rule that the wife, when committing offences in the presence of her husband, is supposed to act *under his coercion*. CHAPMAN, J., among other things, said: "The provisions of the statutes relate to legitimate business, and not to the keeping of brothels. They do not take away his power to regulate his household so far as to prevent his wife from committing this offence, or relieve him from responsibility if it is committed."

The rule exempting a wife from punishment for crime committed in the presence of her husband has been held to extend to all classes of crime. See R. v. Smith, 8 Cox C. C., 27; R. v. Wardroper, 8 Cox C. C., 284; Miller v. State, 25 Wis., 384. See also State v. Banks, 48 Ind., 197; Davis v. The State, 15 Ohio Rep., 72; Com. v. Lewis, 1 Met., 151; 1 Wharton Crim. Law, § 1025, 1256 & 1258; 1 Arch. p. 39–44; 1 Russell on Crimes, 18; Barb. Cr. Law, 276.

Section 288 of the Illinois Crim. Code, Rev. St. 1881 (Cothran's Ann. Ed.), p. 508, enacts that "A married woman acting under the threats, commands, or coercion of her husband, shall not be found guilty of any crime or misdemeanor not punishable with death; *provided*, it appear, from all the facts and circumstances of the case, that violent threats, commands or coercion were made; and in such case the husband shall be prosecuted as principal, and receive the punishment which would otherwise have been inflicted on the wife if she had been found guilty."

ROBBERY.

Robbery is defined to be "the felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence, or putting him in fear." (*a*)

The property need not be taken from the immediate person of the owner; it is sufficient if it be taken in his presence.

If the intent be to steal, and the possession be obtained by force and violence from the person of the owner or in his presence, it amounts to robbery. But a mere sudden taking of a thing unawares from the person as by snatching a thing from the hand or head is not sufficient to constitute a robbery, unless some injury be done to the person, or unless there be some previous struggle for the possession of the property. (*b*)

Robbery may be committed by putting in fear as well as by force. It is not necessary that actual fear should be charged or strictly proved, provided the property be taken with such circumstances of violence or terror, or threatening by word or gesture, as would in common experience induce a man to part with it from an apprehension of personal danger; for the law, *in ordium spoliatoris*, will presume fear where there appears to be so reasonable a ground for it.

So a colorable gift, which in truth was extorted by fear, amounts to a taking and trespass in law and constitutes robbery, and this, though the thing obtained was not originally in the contemplation of the robber, but received as the price of desisting from a felonious attempt of another kind. (*c*)

(*a*) 2 East P. C., 707.
(*b*) R. v. Lapier, Post., 322.
McCloskey v. People, 323.
(*c*) 2 East P. C., 711.

R. v. LAPIER.

O. B., May, 1874, MS.

(2 East, 557.)

ROBBERY.—A momentary possession, though lost again in the same instant, is a sufficient taking.

James Lapier was convicted of robbing Mrs. Hobart on the highway, and taking from her person a diamond ear-ring. The fact was, that as Mrs. H. was coming out of the opera house, she felt the prisoner snatch at her ear-ring and tear it from her ear, which bled, and she was much hurt; but the ear-ring fell into her hair, where it was found after she returned home. Judgment being respited for the opinion of the judges, whether this were such a taking from the person as to constitute robbery; they were all of opinion that it was. It being in the possession of the prisoner for a moment, separated from the lady's person, was sufficient, although he could not retain it, but probably lost it again the same instant, and it was taken by violence.

NOTE.—If the thief once take possession of the thing the offence is complete, though he afterward return it. As if a robber finding little in a purse which he had taken from the owner, restored it to him again, or let it fall in struggling, and never take it up again, having once had possession of it. 2 East P. C., 557.

In Petis' case, O. B. 1781, 2 East P. C., 557, defendant, having robbed Mr. Downe of his purse, returned it again, saying, "If you value your purse, take it back again, and give me the contents;" but before Mr. D. could do

this, his servant secured the robber. The offence was ruled to be complete by the first taking.

In the case of Edward Farrel, 2 East P. C., 557, Farrel, upon an indictment for robbery, was found to have stopped the prosecutor as he was carrying a feather-bed on his shoulders, and told him to lay it down or he would shoot him, on which the prosecutor laid the bed on the ground; but before the prisoner could take it up so as to remove it from the spot where it lay, he was apprehended. The judges were of opinion that the offence was not completed, and the prisoner was discharged.

McCloskey v. The People.

(5 Parker C. R., 299.)

Robbery.—The violence must be sufficient to force the person to part with his property, not only against his will, but in spite of his resistance.

The plaintiff in error was convicted for robbery, in taking violently from the person of Halsey F. Wing four pieces of silver coin of the value of one dollar, and one hat of the value of four dollars.

Emott, J. The Revised Statutes define robbery in the first degree to consist in feloniously taking personal property of another from his person or in his presence against his will, by violence to his person, or by putting such person in fear of immediate injury to his person. 2 R. S., 677, § 55. The common law definition of robbery was the same: 4 Bl. Com., 243; 1 Hale Pl., vol. 1, ch. 46; 2 East Cr. Law, ch. 16, § 124, seq. The mere snatching anything from the hand or the person of any one, without any struggle or resistance by the owner, or any force or violence on the part of the thief, will not constitute robbery.

In Goscoigne's case, Leach, 313; East Cr. Law, vol. 2, p. 709, the prisoner snatched some money out of the pocket of a

woman whom he was conveying to prison on a criminal charge. The prisoner was not a constable, but attended the police office as a runner. He was convicted of robbery, and the conviction was sustained on the ground, which was proved, that he had violently forced the woman into a coach and handcuffed her, with the felonious intent of getting her money, and the direction to the jury at the trial put the case upon this exclusively. The cases which are often cited of taking an ear-ring, which was held to be a robbery when it was taken with such violence as to lacerate the ear of the wearer (*a*), or a diamond hair ornament tearing out with it a part of a lady's hair from her head, are illustrations of the rule as to the degree of violence necessary to constitute the offence of robbery. Leach, 238.

The court below, in the present case, instructed the jury in effect that feloniously taking another's property with violence, sufficient to constitute an assault and battery, would make out the crime of robbery; and again, that if they believed the story of the principal witness, the offence was made out.

In these instructions the judge was in error. In the cases to which I have referred, as well as in many others to be found in the books, the snatching the property was sufficient to constitute an assault and battery, yet that alone did not make the felonious taking more than a larceny. The property must be taken by violence to the person, which means more than a simple assault and battery. The violence must be sufficient to force the person to part with his property, not only against his will, but in spite of his resistance. The rule of law laid down by the court below went further than the authorities justify, and the application of the rule to the facts was also incorrect.

The proof showed that the prisoner took the money which he stole out of the prosecutor's pocket, while they were walking together in a friendly manner.

No more force was used than sufficient to pull the money out of the pocket of the witness.

Both the men had been drinking, and the prosecutor, at the time of the act, evidently considered and treated the prisoner's conduct as a joke. He made no resistance, and yielded neither

(*a*) R. v. Lapier, Ante p. 322.

to force or fear. If he was led to entertain the idea that the prisoner intended to rob him, or to any fear or apprehension of violence or injury from him, it was not, as he himself states, until after this offence was committed.

Under these circumstances, the violence to the person in taking the property, which is the essential element of robbery, was wanting, and the prisoner's offence was simply a larceny.

The judgment of the court of sessions must be reversed and a new trial ordered.

BEALL v. STATE.

(53 Ala., 460.)

BURGLARY.—The indictment was for burglary, averring a breaking and entry, "of the dwelling-house of the late John Tate, said house now, and at the time of the offence committed, belonging to the estate of the late John Tate." *Held*, insufficient in not stating the name of the owner of the house.

The case is sufficiently stated in the opinion.

BRICKELL, C. J. The indictment is for burglary, averring a breaking and entry, in the first count "of the dwelling-house of the late John Tate, said house now, and at the time of the offence committed, belonging to the estate of the late John Tate;" and in the second count, it is averred to have been "the dwelling-house of the estate of the late John Tate." The common law requires that an indictment for burglary must lay with precision the ownership of the house in which the offence has been committed, and the proof must conform to the averment; 2 Lead. Cr. Cases, 53; 2 Bish. Cr. P., secs. 135–

6-7-8; 2 Whart Am. Cr. Law, sec. 1555, *et seq.;* 1 Russ. Crim., 806. The statutes have not abrogated or modified the rule; on the contrary, the form of indictment prescribed contains an express averment of ownership: R. C., p. 811, form No. 35.

There is no averment of ownership in either count of this indictment. That which is intended as such an averment shows on its face that the ownership is not disclosed. If the person described as John Tate is dead, and that is the intendment, and during life was the owner of the dwelling, on his death it devolved on his personal representatives, heirs or devisees. Who these are is not averred. In *Pleasant* v. *State*, 17 Ala., 190, the indictment described the defendant as a slave, "the property of the late William Copeland." Dargan, C. J., said: "Is the ownership of the accused sufficiently averred? The allegation is that Pleasant, a slave, 'the property of the late William Copeland.' In the sense in which the adjective *late* is here used, it means existing not long ago, but now departed this life. This is the meaning all would give it, and no doubt is the meaning intended to be attached to it by the pleader. The accused is, therefore, alleged to be the property of one not in life. This cannot be, for the dead can own no property. Death strips us of all rights and title to property, and casts them on the living, who alone can own property. The ownership of the accused is therefore, not alleged, and the indictment is, consequently defective." It must be observed of this case, that the ownership of the accused, nor his *status*, was an ingredient of the offence with which he was charged. The only purpose of its averment was that in the event of conviction, it should be ascertained to whom the state must make compensation for the loss of property on his execution. The house broken and entered must not be the house of the accused, in which he had the lawful right of entry. The ownership is as essential as the ownership of goods on an indictment for larceny, or on any other indictment for an offence against property.

It is a well known rule of criminal pleading, that when it becomes necessary to aver the ownership of property which resided in one dead, while living, if it is personal property, passing to the personal representative of which he has custody, actually or constructively, the ownership must be laid in him.

If real property, then in the heir or devisee; and it is generally sufficient to aver it in the actual possessor. An illustration, which clings to the memory of the lawyer, is given by Lord Hale: "If A. dying, be buried, and B. opens the grave in the night time and steals the winding sheet, the indictment cannot suppose them the goods of the dead man, but of the executor, administrators, or ordinary, as the case falls out;" 2 Hale's Pleas Cr., 181. The indictment was insufficient, and the conviction erroneous. For aught that appears on the face of the indictment, the accused may have been the owner of the dwelling-house. He may have been the heir, or divisee, or the personal representative of the deceased, having its possession, and the lawful right of entry. Such a presumption is not excluded by the averments. The case of Anderson v. The State, 48 Ala., 665, and Murray & Bell v. The State, ib., 675, it may be induced the framing of the indictment in its present form. These cases cannot be supposed on principle or precedent, and are introductive of a laxity in criminal pleading that ought not to be tolerated, and are consequently overruled.

The judgment is reversed and the cause remanded, but the prisoner will remain in custody until discharged by due course of law.

As to the ownership of property of a deceased person. See, State v. Dopeke, Ante p. 257.

WATERS v. STATE.

(53 Ga., 567.)

BURGLARY.—When one is prosecuted for burglary in the *night*, the testimony should be such, as to the time when it was committed, as to exclude all reasonable doubt upon that point.

TRIPP, J. 1. The proposition is unquestioned, that in all criminal prosecutions, it is incumbent on the state, on the traverse trial, to show affirmatively, either by positive testimony or other satisfactory evidence, that the defendant is guilty of the offence charged against him, or of some less crime which the law permits him to be found guilty of under the indictment. This rule applies to an indictment for burglary in the night. It was but a few years ago that this offence was punishable with death, or, by special recommendation of the jury, by imprisonment for life, whilst the penalty for burglary in the day was imprisonment from three to five years. Rev. Code, secs. 4321, 4322. Now the penalty for the former is imprisonment from five to twenty years; for the latter it is unchanged. Would it be going too far to say that when one is prosecuted for burglary in the night, the testimony should be such as to the time when it was committed, as to exclude all reasonable doubt upon that point, before a verdict of guilty could be authorized? If there had been no change in the penalty, and that was yet a capital one, the rule would scarcely be doubted. As it is, the maximum for one grade is twenty years in the penitentiary; for the other, five years.

2. Where the evidence leaves the time in which the offence

was committed exactly balanced between day and night, that is, that it was committed within the period of about forty or forty-five minutes, one-half of which was day and one-half was night, the defendant should have the benefit of the doubt necessarily arising, and the conviction should not be for the highest grade. If a jury reasonably doubt whether a defendant be guilty of murder or manslaughter, that doubt is resolved in favor of life. So, if the doubt be as to different grades of manslaughter, the defendant should have the benefit of it, and the lowest grade covered by the doubt is to be found. It would be difficult to limit the application of this principle and we think it should control this case. The chief evidence against this defendant was the fact that he was in possession of the watch, which was taken from the house several days after the burglary was committed. I will not remark upon the character of such testimony, whether it is always sufficient to convict, for the authorities are somewhat in conflict; but we say, that, under the proof in this case, we think the defendant should have the full benefit of the first rule we announce in this case.

Judgment reversed.

NOTE.—In Jones v. The People, 6 Parker's C. R., 126, the burglary was committed on the night of the 15th of April. On the 20th of the same month the stolen property was found in possession of the prisoner, who lived in the same village, and the supreme court held that the unexplained possession of the property was sufficient to sustain a conviction for burglary and grand larceny.

In State v. McDonald, 73 N. C., 346, the defendant was convicted of burglary in the night time, and the only evidence as to the time the burglary was committed was that of Green, the prosecutor, who testified: that on the morning of August 12th he discovered, between daylight and sunrise, that his house had been broken into, and this was held sufficient evidence to justify a conviction for burglary in the night time.

For a complete line of authorities upon the subject of burglary at common law, and as modified by statute, see 2 Arch Crim. Prac. & P., p. 1069, 1112; 2 Wharton Crim. Law (7th ed.), § 1532, 1618.

FALSE PRETENSES.

This offence is defined by Hawkins as "the deceitful practices in defrauding or endeavoring to defraud another of his known rights by means of some artful device contrary to the plain rules of common honesty." Mr. East, doubting the sufficiency and accuracy of this definition of the offence at common law, defined it as being "the fraudulent obtaining the property of another by any deceitful and illegal practices or token (short of felony) which affected or may affect the public."

Every species of fraud or dishonesty between individuals was not the subject of a criminal charge at common law; to make it such it was necessary that the cheat or fraud affected the public, and deceived the people in general, such as were effected by means of false tokens, and it was necessary that such tokens were calculated to defraud numbers, and to deceive the people in general, something against which ordinary prudence was not sufficient to guard, as false weights or measures. (*a*)

(*a*) 2 East P. C., 817.

R. v. Wheatly.

(1 Hale, 506.)

Cheats at Common Law.—Fraud to be the subject of criminal prosecution, at common law, must be the kind which in its nature is calculated to defraud numbers.

Wheatly, a brewer, was indicted at common law, for that he, intending to deceive and defraud R. W. of his money, falsely, frudulently and deceitfully sold and delivered to him 16 gallons of amber for and as 18 gallons of the same liquor, and received 15s. as for the 18 gallons, knowing there were only 16 gallons. This the court were clearly of opinion was not an indictable offence, but only a civil injury for which an action lay to recover damages.

Lord Mansfield, C. J., said: "It amounts only to an unfair dealing, and an imposition on this particular man by which he could not have suffered but from his own carelessness in not measuring it; whereas, fraud to be the subject of criminal prosecution must be of that kind which in its nature is calculated to defraud numbers, as false weights or false measures, false tokens, or where there is a conspiracy."

REX v. LARA.

(6 Terms Rep., 565.)

CHEATS AT COMMON LAW.—Making use of an apparent token, which in reality is, upon the very face of it, of no more credit than his own assertion, does not change the rule.

Lara was indicted at common law, for deceitfully intending by crafty means and device to obtain possession of certain lottery tickets, the property of A., pretending that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order for payment of money subscribed by him, Lara, etc., purporting to be a draft upon his bank for the amount which he knew he had no authority to draw, and that it would not be paid; but which he falsely pretended to be a good order, and that he had money in the banker's hands, and that it would be paid; by which he obtained possession of the tickets, and defraud the prosecutor of the value. Judgment was arrested, on the ground that the defendant was not charged with having used any false token to accomplish the deceit; for the banker's check drawn by the defendant himself entitled him to no more credit than his bare assertion that the money would be paid.

The People v. Haynes.

(14 Wendell, 446.)

False Pretenses.—Where goods are delivered to a common carrier upon the order of a purchaser, they are in his possession, and any false representation in respect to his ability to pay, made by the purchaser after such delivery, are not within the statute. And the fact that the vendor had received information inducing him to suspect the *solvency* of the purchaser, and would have reclaimed the goods, were it not for the false pretense does not change the rule.

All the false pretenses alleged need not be proved in order to convict.

A mere falsehood in not a false pretense within the statute.

The case is sufficiently stated in the opinion of the court.

By the Chancellor. We are called upon in this case to review a decision of the supreme court, upon a bill of exceptions taken on the trial of the plaintiff in error, upon an indictment for obtaining goods by false pretenses. No bill of exceptions can be taken in a criminal case, to authorize a superior court to correct an erroneous opinion of the court below, or the decision of a jury, upon matters of fact merely. The recent provision of the revised statutes only authorizes the defendant, on the trial of an indictment, to except to decisions of the court in the same cases, and in the manner provided by law in civil cases, 2 R. S. 736, § 21; and it is well settled in civil cases, that the charge of the court or the decision of the jury, upon matters of fact, cannot be reviewed on a bill of exceptions, where there has been no erroneous decision of the court upon matters of law. The remedy of the party who is injured by a misdirection of the court, or an erroneous verdict of a jury upon mere questions of fact, is by an application for

a new trial, and not by writ of error. Graham v. Commann, 2 Caines' R., 168; Buller's N. P. C., 316. Mr. Justice Story, in delivering the opinion of the supreme court of the United States, in the case of Carver v. Jackson, 4 Peter's R., 80, says, the court to which a writ of error is brought has nothing to do with the charge of the court below upon mere matters of fact, or with its comments upon the weight of evidence. Such observations are understood to be addressed to the jury, as the ultimate judges of matters of fact, merely for their consideration, and are entitled to no more weight or importance than the jurors in the exercise of their own judgments choose to give them. But if the court, in summing up the evidence to the jury, should mistake the law, it would furnish a proper ground for an exception to the charge of the court. Even in that case, however, the exception should be strictly confined to such mistake in the law which was applicable to the case. Whether it is competent for the court before which an indictment for felony is tried, to grant a new trial at the instance of the defendant, where there has been a palpable misdirection of the court upon mere matters of fact, or a verdict clearly against the weight of evidence without any such misdirection, when no erroneous decision in point of law has been made, is a question which this court is now called upon to decide. If the court before which the trial is had cannot grant a new trial in such a case, the remedy, if any, is with the legislature; as it is a settled principle of law that no writ of error lies to an inferior court, to review its decision upon matters of fact. So much of the charge of the recorder, in the present case, as relate to the sufficiency of the evidence to establish the falsity of the pretenses charged in the indictment, must therefore be laid out of view by this court in its decision, as being merely the expression of an opinion upon questions of fact which were submitted to the jury for their consideration, and not an erroneous decision of the court, upon a question of law, for which a bill of exceptions would lie. It is insisted, however, by the counsel for the plaintiff in error, that the charge was erroneous in point of law, because the jury were instructed it was not necessary for the public prosecutor to establish the falsity of all the pretenses charged in the indictment as false; but that it was sufficient to

authorize a conviction, if the jury were satisfied that some of the pretenses were false, and that the accused obtained the goods solely and entirely on those pretenses, which were proved to be false, with an intent to cheat and defraud the person from whom the goods were thus obtained. On this point I agree with Mr. Justice Nelson, who delivered the opinion of the supreme court, that the charge in this respect was more favorable to the accused than a correct construction of the statute would warrant. It is not necessary, to constitute the offence of obtaining goods by false pretenses, that the owner should have been induced to part with his property solely and entirely by pretenses which were false; but if the jury are satisfied that the pretenses proved to have been false and fraudulent were a part of the moving cause which induced the owner to part with his property, and that the defendant would not have obtained the goods, if the false pretenses had not been superadded to statements which may have been true, or to other circumstances having a partial influence upon the mind of the owner, they will be justified in finding defendant guilty of the offence charged, within the letter as well as within the spirit of the statute on this subject. I am accordingly of the opinion that, in the case now under consideration, although all the pretenses stated in the indictment, as those upon the strength of which the goods were obtained, were charged to be false, if either of them was in fact false, and was intended to deceive the owner of the goods, and thus to induce them to part with their property, and actually produced the effect, the indictment was sustained. One false pretense was sufficient to constitute the crime, although other false pretenses were also charged in the indictment. As a general rule, if an averment in an indictment is divisible in its nature, and any one part thereof is sufficient of itself to constitute the crime, the other part of the averment need not be proved, unless they are descriptive and material to the identity of that which is essential to the charge contained in the indictment. Thus, in an indictment for treason, where several overt acts of the same treason are charged in one count of the indictment, it is sufficient to sustain the count if any one of them is proved. Lowick's case, 13 Howell's State Trials, 277. So in an indictment upon the statute, mak-

ing it a capital felony for clerks, carriers, and others employed in the care or transportation of mail, to steal or take out of a letter any bank post-bill, note, bill or exchange, etc., it was held sufficient to prove that the defendant was employed in one capacity, in the care of the mail, although the indictment charged that he was employed in two; and where the indictment charged that the letter which was purloined contained a bank post-bill and a bill of exchange, it was held sufficient if the proof showed it contained either. Rex v. Ellins, Russ. & Ryan's C. C. R., 188; see also, Rex v. Shaw, 2 W. Black. R., 790. In the case of The King v. Hunt, 2 Camp. R., 584, which was an indictment for composing and publishing a libel, Lord Ellenborough held it sufficient to prove the publication, although no evidence was adduced to show the composing of the libel by the defendant; that if an indictment charged that the defendant did and caused to be done a particular act, it was enough to prove either.

He also says, "this distinction runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified." See also, The King v. Hollingberry, 4 Barn. & Cress. R., 329, and Hill's case, Russ. & Ryan's R., 390.

Neither is it necessary to constitute the statutory offence of which the plaintiff in error was convicted, that any false token should be used, or that the false pretenses should be such that ordinary care and common prudence were not sufficient to guard against the deception. Such was undoubtedly the rule in relation to cheats, which were punishable by indictment by the common law in England. On this subject our English ancestors originally adopted a laxer rule of morality than their Scottish neighbors, who very properly held the crime of swindling, or obtaining goods by willful lying or other false pretenses, as on a par in point of moral turpitude with stealing; and it was punished accordingly under the common law of Scotland. Thus in Hall's case, 1 Hume's Crim. Law, 173, the prisoner was convicted, and transported for seven years, for the crime of falsely assuming the character of a merchant, by hiring a shop and filling it with fictitious bales; by which pretenses he

induced several persons to furnish him with goods on a credit, when he had, in fact, no intention of carrying on business as a trader. In Scott's case, 1 Alison's Crim. Law, 365, the swindling for which the prisoner was convicted, and sentenced to eighteen months' imprisonment, was the obtaining of hay from a farmer, upon the false and fraudulent pretense that he was the contractor's clerk, taking up forage for the use of the cavalry. Joanna Rickerby was also convicted of swindling in obtaining wearing apparel, by assuming a false name and falsely pretending that she had lost her clothes by shipwreck. In Reid's case, Burnet, 173, the fraud consisted in falsely assuming the character of an excise officer, and thus obtaining money under the pretense of compounding for the forfeiture on goods that had been smuggled. In Harvey's case, 1 Alison, 364, the prisoner was convicted, and transported for seven years, for obtaining goods deposited with another by the owner, for safe keeping, under the false pretense that he was employed by such owner to receive the goods so deposited; and in Kirby's case, 1 Hume, 174, the prisoner was sentenced to be transported for five years, for obtaining a sum of money from a bank in Leith, under the false pretense that he had money in the hands of his banker in London, and accordingly drawing a draft on a bank there with whom he had no account, and when he had no reason to suppose the draft would be paid.

It was found in England, as early as the reign of George II., that the rule of the English common law was not sufficiently rigid to protect the honest and unsuspicious—that class who stand most in need of protection against the falsehoods and impositions of swindlers; and a statute was thereupon passed, to remedy the defect of the common law, which is the origin of our own statutory provisions, and of the subsequent English statutes on this subject. These statutes have adopted the principles of the Scottish common law, and the decisions under them, both in this State and in England, have been substantially the same as in the cases above referred to from Hume, Burnet and Alison, who are the principal writers upon the criminal law of Scotland. Under these statutes, as in the law of Scotland, the offence consists in intentionally and fraudulently inducing the owner to part with his goods, or other

things of value, either by a willful falsehood, or by the offender's assuming a character he does not sustain, or by representing himself to be in a situation which he knows he is not in. Thus in Airey's case, under the English statute, the prisoner was convicted, and transported for seven years, for obtaining pay for the carriage of goods, upon the false pretense that he had delivered the goods and taken a receipt for the same, which he had lost or mislaid: 2 East's R., 30. So in Witchell's case, 2 East's P. C., 830, the obtaining of money upon a false account of the number of workmen employed in the business of a manufacturing establishment, by which the prisoner, who was entrusted to pay them, obtained a larger sum than was due to them for their wages, was held to be within the statute. In Rex v. Jackson, 3 Camp. R., 370, upon an indictment for obtaining goods under the false pretenses of immediate payment, by giving in payment a check on a banker with whom the prisoner had no funds, and with whom he kept no account, BAILEY, J., said the same point had recently been before the twelve judges, and they were all of opinion that it was an offence indictable under this statute, to obtain goods by giving a check upon a banker with whom the party kept no cash, and which he knew would not be paid. In this state, also, so far as questions have been brought before the higher tribunals, the statute has received a similar construction; and the decisions in the courts of over and terminer, so far as they have come under my notice, especially since the decision of the case of The People v. Johnson, in 1815, 12 John. R., 292, have been in conformity with the principles adopted by the English judges, in giving effect to their statutory provisions on this subject. Lynch's case, cited by the counsel for the plaintiff in error, from the City Hall Recorder, 1 City Hall Rec., 138, was incorrectly decided, as the offence in that case was clearly within the statute. The fact that checks are frequently drawn by men of business, before they have funds actually in bank to meet them, could not alter the law of the case, as it must always be a question for the consideration of the jury, whether the prisoner intended to commit a fraud by imposing a check upon another which he knows would not be paid when presented.

I am aware, from the numerous cases which have come under my observation, judicially and otherwise, that the rule of morality established by the decisions under the statutes, and by the common law of Scotland, had been deemed too strict for those who, in 1825 and subsequently, have been engaged in defrauding widows and orphans, and the honest and unsuspecting part of the community, by inducing them to invest their all, which in many instances was their only dependence for the wants and infirmities of age, in the purchase of certain stocks in incorporated companies, which the venders fraudulently represented as sound and productive, although they at the time knew the institutions to be insolvent, and their stock perfectly worthless. But I am yet to learn that a law, which punishes a man for obtaining the property of his unsuspecting neighbor by means of any willful misrepresentation, or deliberate falsehood, with intent to defraud him of the same, is establishing a rule of morality which will be deemed too rigid for the respectable merchant and other fair business men of the city of New York, or of any other part of the state. Neither do I believe any honest man will be in danger of becoming a tenant of the state prison, if the statute against obtaining money or other things of value, by false and fraudulent pretenses, if carried into full effect, according to the principles of the decisions to which I have referred. But it may indeed limit and restrain the fraudulent speculations and acts of some, whose principles of moral honesty are regulated solely by the denunciation of the penal code. The law upon this point, as laid down by the supreme court in this and numerous other cases, is unquestionably the settled law of the land, in conformity with both the spirit and intent of a positive legislative enactment. But if those members of this court, who are senators, believe that either the morals or the welfare of the community will be promoted by repealing this statutory provision for punishing the crime of swindling, which in point of moral turpitude is frequently more aggravated than some cases of simple stealing, it will be their duty, in their legislative capacities, to vote for a repeal of the law; leaving the honest and unsuspecting to protect themselves as they may against the arts and deceptions of those who intention-

ally defrauded them of their property, by willful and corrupt lying, and other false pretenses, calculated to deceive that class of citizens which is most in need of the protection of the law. In this place, as members of the court of dernier resort, it is our duty to declare the law as it now exists; so that the declared will of the legislature may be carried into full effect. In the case now under consideration, I have no doubt that the prisoner was properly convicted of the offence charged in this indictment, if the goods were obtained upon the representations which were proved to be false. It is evident from the testimony that, at the time the representations were made, he was hopelessly insolvent to the amount of seventy thousand dollars; that he knew his situation, and for the purpose of inducing the owners of the goods to let him have them on a credit, he represented himself as in easy and unembarrassed circumstances as to his money matters, able to pay all he owed; and that he was worth from nine to ten thousand dollars over and above all his debts. It only remains, therefore, to consider the question whether the delivery of the goods was obtained by means of these false and fraudulent pretenses, or whether, in legal contemplation, the goods had been delivered before that time, although the prisoner was not then aware of the fact.

It appears from the testimony that the plaintiff in error had been in the habit of dealing with Cochran, Addoms & Co., previous to the time when these goods were obtained, and upon credit of about four months, that when he applied for these goods, they entertained no suspicion as to his credit; that the goods were selected, packed up in a box marked Charles Haynes, Boston, which was the place of his residence, and sent on board of the Providence steamboat, according to his direction, to be transported at his expense to the latter place, and taken from thence to his place of residence; and that a receipt was taken therefor from the master of the steamboat, stating that the box of goods was to be transported to Providence and delivered to the Boston wagoner, who received goods at Providence and delivered them at Boston, according to the marks and addresses on the packages; and one of the prosecutors, who was a witness, testified that after the box was delivered on board the steamboat, as directed by Haynes, he considered it

as being at the risk of the latter if it was lost or stolen. After the box had thus been delivered on board the boat, but before Haynes was aware of that fact, the witness heard a report respecting the latter, which induced him to suspect his credit; and upon Haynes coming to the store, the witness, without informing him that the goods had already been sent to the steamboat, told him they could not deliver the goods in consequence of having heard that he had had a note protested. Upon which occasion the false representations as to his situation and credit were made; and the witness being satisfied therewith, handed to him the receipt and invoice of the goods, and took his note for the same at thirty days. The counsel for the prisoner insisted, and asked the court so to instruct the jury, that delivery of the goods on board of the boat was a complete delivery, and that as the pretenses were made after such delivery, although they might have prevented Cochran, Addoms & Co. from obtaining a re-delivery of the same, that was not sufficient to sustain the charge as laid in the indictment. The court, however, charged the jury that the prisoner had undoubtedly obtained the goods from the prosecutors, as charged in the indictment; to which charge an exception was taken. If the decision of the court was wrong upon this question of law which arose in the case, the judgment of the court below should be reversed, on the ground that the plaintiff in error did not obtain the delivery of the goods by reason of his false pretenses although he intended to do so at the time the false representations were made.

The supreme court considered the delivery of the goods as incomplete and conditional, because the invoice had not been delivered, nor the security for the purchase money given, and because the receipt of the master of the boat was still in the hands of the vendors. I do not understand from the testimony, however, that there was any agreement or understanding between the parties, either express or implied, that the goods should be retained until the invoice should be delivered and a note given for the purchase money; and the receipt of the master of the boat was merely taken by the vendors as a voucher, to show that they had sent the goods on by the boat as directed. From the testimony, it also appears that the possession of the

receipt was not necessary to enable the purchaser to obtain the goods upon their arrival at the place of destination. Even where goods are sold upon the understanding that they are to be paid for on delivery, if goods are delivered without insisting upon payment at the time of delivery, the title passes absolutely to the purchaser, unless there is a special agreement or a usage of trade showing the delivery to be conditional. Delivery of goods also to a servant or agent of the purchaser, or to a carrier or master of a vessel, when they are to be transported by a carrier or by water, is equivalent to a delivery to the purchaser; and the property, with the correspondent risk, immediately vests in the purchaser, subject to the vendor's right of stoppage in transitu, if the purchaser becomes insolvent before the goods arrive at their place of destination; and particularly when the carrier is specially named by the vendee. 2 Kent's Comm., 499; Dawes v. Peck, 8 T. R., 330. In the present case, therefore, I think we are bound to consider the delivery of the box on board of the boat, to be sent on to the vendee's residence at Boston, and delivered there according to the direction on the box itself, as a valid delivery of the goods, so as to divest the vendors of the possession as well as the title; leaving them the mere right of stoppage in transitu, in case of the purchaser's insolvency.

The right of the vendor to reclaim his goods, as a security for the unpaid purchase money, while in the hands of the middleman, was originally derived from the court of chancery. It is a mere equitable authority to repossess himself of the goods, upon the insolvency of the vendee; and it cannot be exercised at the mere caprice of the vendor, when no such insolvency exists. Per Lord Stowell, in the case of The Constantia, 6 Rob. Adm. R., 321. To invest the vendor with the right of property and possession of the goods after they have been absolutely dilivered to the carrier or middleman, there must be an actual stoppage by a positive exertion of the right, by the vendor or his agent, either by taking corporeal possession of the goods, or by a notice to the carrier not to deliver them to the vendee, or by some equivalent act; and until such right is actually exercised, the right of property and possession remains in the vendee, who may maintain an action of trover against

any one withholding the goods from him. But the actual exercise of the right re-vests the title to the property in the vendor, and enables him thereafter to maintain trover against any one who subsequently to the exercise of this right, obtains possession of the goods and refuses to deliver them to him. Litt v. Cowley, 7 Taunt. R. 169. In the present case the right of possession and of property was actually vested in Haynes, by the delivery on board the steamboat at the time the false and fraudulent pretenses were put forth by him; and the vendors had not in fact re-invested themselves with the title to the property by stopping it in transitu. He did not, therefore, in legal contemplation obtain the possession or delivery of the property by means of the false pretenses stated in the indictment; although he intended to do so, not being aware of the fact of the delivery of the goods on board the steamboat, at the time the false representations as to his situation and solvency were made. Although in point of moral turpitude there is no essential difference between obtaining the possession of the goods by willful and deliberate falsehoods in the first instance, and preventing the vendor from exercising a legal and equitable right by similar fraudulent and corrupt means, it would, I think, be going too far, in a prosecution for felony, to say the two cases are the same, and that the accused may be convicted of the latter offence, under an indictment charging him with obtaining the delivery of the goods by means of these false pretenses.

I therefore, for this reason only, think the judgment of the court below was erroneous, and that it should be reversed.

By Senator Tracy. I think some of the exceptions to the charge of the recorder were well taken, and that the supreme court has erred in deciding otherwise.

The indictment was under the statute against obtaining property by false pretenses with intent to defraud. The proof on the trial went entirely to show that the goods were obtained on a previously established credit, without any pretense or representation whatever, and at most, that after being so obtained the defendant succeeded in retaining the possession of them by means of false pretenses. If this be the true character of the transaction, the defendant was convicted of an offence not

prohibited by law, and for which he certainly was not indicted. Whether it be so or not, depends on the fact of the delivery of the goods. Addoms, the principal witness for the prosecution, testified that Haynes had a very good credit with the house of which the witness was a partner, that he (Haynes) selected the goods himself, that they were put aside from the rest of the goods, packed up in a box, which was marked on the outside and addressed to Charles Haynes, Boston, being the place of his residence; that the goods were afterward sent to the Providence steamboat, according to Haynes' directions, and a receipt taken by the cartman.

I can have no doubt that these facts constitute an absolute delivery, and indeed it is admitted on all sides that it was such a delivery as put the property wholly at the risk of the vendee, and, it might be added, such a delivery as would enable him to maintain trover, or any other action for their loss or injury. But it is said that while the goods were in this situation, and before they had reached their final destination at Boston, the vendors had a right to resume the actual possession of them. This I very much doubt; for the fact that Haynes was on the spot, personally to select the goods, and to have them laid aside, boxed and directed, seems to me to be a perfect delivery, such as to deprive the vendee of any specific lien on them. I take the rule to be, that though goods are sold upon credit, yet if they are actually delivered to the purchaser without any arrangement as to the security for the payment of them, the vendor's lien upon them is gone. 3 East, 396, 5 id., 175; 4 Esp. R., 82. The case is in this respect distinguishable from those in which the goods have never reached the hand of the vendee, but have only passed from the hands of the vendor to some intermediary person as a carrier, etc., to be by him delivered to the vendee. But supposing the fact that Haynes' presence at the purchase and setting aside of the goods made no difference as to the character of his possession, and that they were only in transition, so that the vendor still had a lien on them, Haynes was yet the legal owner of the goods. So far as ownership is concerned, the delivery to the master of the steamboat, or even to the cartman, was sufficient, and any disposition which Haynes saw fit to make of them would be

valid, subject at most to the equitable lien of the vendor for the amount due to him. Delivery of goods to a servant or agent of the purchaser, or to a carrier or master of a vessel, where they are to be sent by a carrier or by water, is equivalent to delivery to the purchaser, and this though the carrier was to be paid by the vendor. 2 Camp., 639; 3 Bos. & Pul., 584; 6 Cowen, 114. The right of stoppage *in transitu* has not the effect which the supreme court seems to suppose of making the delivery conditional, but is only a lien which the vendor, under certain circumstances, may enforce to secure the price, and even if enforced, the goods strictly belong to the vendee; and if they shall prove of more value than the lien, though that be for the whole purchase money, the balance belongs to the vendee. It is erroneous to suppose that the right of stoppage continues the ownership in the vendor. "It is a contradiction of terms," says Justice BULLER, "to say a man has a lien on his own goods, or has a right to stop his own goods *in transitu*." The right of the vendor to stop goods *in transitu*, in case of the insolvency of the vendee, originated in the courts of equity, and was first heard of in Wiseman v. Vandeput, 2 Vern., 203; and though it has been greatly favored and encouraged by the courts of law, as well as those of equity, for the purpose of substantial justice, yet it has never been held to rest on the ground of a right to rescind the contract, vide Hodgson v. Loy, 7 T. R., 445; and therefore it is settled that a court of equity has no jurisdiction to support it by process of injunction, 2 Kent's Comm., 492.

But the supreme court thinks that, although the property was undoubtedly for some purpose to be considered delivered, yet the delivery was "incomplete and conditional," so that the vendors had the right to resume the possession. If this was conceded, I do not see how it affects the present question, unless the offence charged was that of preventing the vendors from resuming the possession by means of false pretenses, which it requires no argument to show would not sustain an indictment. But I find nothing in the case to show that the delivery was "incomplete and conditional;" indeed I am not sure that I comprehend what is meant by an incomplete delivery, but presume it means, at most, no more than a con-

ditional delivery; and to constitute a conditional delivery, it is necessary the condition should be express. 4 Mass. R., 405; Furniss v. Hone, 8 Wendell, 247. The circumstances from which the supreme court infer that the delivery was conditional, are, 1. The invoice had not been delivered; 2 Security for the purchase money had not been given; and 3. The receipt of the master of the boat was in the hands of the vendors. The first and last of these circumstances no way affect the fact or character of the delivery; the invoice or bill of the goods was immaterial, and the receipt of the master of the boat was necessarily given after the delivery, and of course any disposition made of it could not affect that fact. The objection that "security for the purchase money had not been given," assumes what no where appears, that security was to be given. The utmost security that could have been contemplated was the purchaser's note, and if this had been an express condition of the sale, of which there is no evidence, yet it was waived by a delivery without a concurrent and express demand. This principle was fully settled in Chapman v. Lathrop, 6 Cowen, 110, and in this court, Lupin v. Marie, 7 Wendell, 77. In every view, therefore, that I can take of this point, I am satisfied the exception that there was no evidence that the goods were obtained by means of the false pretenses was valid.

I am also satisfied that another exception was well taken; it is that to the instruction to the jury, that if some of the pretenses were false, and they (the jury) believed the goods were obtained solely by means of them, the indictment was sustained, notwithstanding other pretenses alleged to be means of obtaining the goods, and averred to be false, were not proved to be false. My impression, on the argument, was against this exception; but on re-examining the opinion of the supreme court, their views on this point appears to me plainly erroneous. The offence of obtaining goods by false pretenses is combined of two distinct elements, to wit, false pretenses, and obtaining the goods; neither of them alone constitutes an offence. An indictment, therefore, must set forth the pretenses by which the goods were obtained, and expressly aver them to be false; and when so set forth and averred to be false, they, together with the obtaining of the goods, constitute the offence

charged. It follows, necessarily, that every pretense thus set forth, and charged to be false, is made a substantive part or constituent element of the offence for which the indictment is found, and of course cannot be deemed immaterial, much less impertinent. The distinction between material and immaterial averments in an indictment is settled to be, that if the averment be connected with the charge, it must be proved; but if it be wholly immaterial, or if the averment be totally unconnected with the charge, it need not be proved, 1 Chitty's Crim. Law, 192. Here each and every pretense set forth and alleged to be false is not only intimately connected with the circumstances that constitute the crime, but in fact a part and portion of the crime charged. It is therefore a much stronger case than those usually put, to distinguish a material from an immaterial or impertinent averment. The general rules and principles of pleading with respect to the structure of a declaration are applicable to an indictment, and if we look at the decisions as to averments in the former, which must be proved as laid, there would seem no room for doubting the necessity in the present case. The leading case, Bristow v. Wright, Dougl., 665, settled by a judge renowned for disregarding technical rules when they interfered with substantial justice, was of an averment by no comparison as material as that under consideration. The supreme court seems to regard the cases of The King v. Berrott, 2 Maule & Selw., 370, and The People v. Stone, 9 Wendall, 182, as authorities which support the recorder's charge on this point; but I find nothing in them that can be properly viewed in this aspect, certainly not in the first case, the whole reasoning of which is to show the necessity of making the charge specific, by a distinct averment of the falsity of these pretenses or representations which are intended to be relied on as constituting the offence. Why it should be indispensable thus to designate them, if they or any of them, when so designated and averred, can be disregarded on the trial as "not intimately connected with the circumstances which constitute the crime," I am unable to perceive; and in Stone's case though there is an expression of the court seeming to confound the case of several pretenses with that of several assignments of perjury in one

count, yet Justice Sutherland, who delivered the opinion, in showing that it was necessary to negative only the pretenses relied upon as material, says: "If it were necessary to negative all the false pretenses in the indictment, it would be necessary to prove them all false on the trial;" plainly indicating that notwithstanding his intimation of its being sufficient to prove one of several assignments in the same count, he perceived the necessity of making the proof, on an indictment for false pretenses, co-extensive with the pretenses specially averred to be false. The supposed analogy to an indictment for perjury does not hold. These several perjuries, each constituting a distinct offence, may be assigned in the same count, and proof of one is sufficient; which is indeed no more than to say, if several offences are charged in several counts, proof to support one count is sufficient; but here the several false pretenses charged constitute but one offense, and each is alleged by the indictment as an ingredient of it. To say that enough of them was proved to show that the jury did no injury to the prisoner by convicting him, is no more satisfactory than the same argument might be if there had been no indictment whatever. The objection of the inconvenience and difficulty of proving every pretense to be false that the indictment alleges to be false, is entitled to no weight, even if such inconvenience and difficulty really exist; but they do not. The grand jury have no right to find that any other pretenses were false than such as are proved to them to be so; and if they do not, there will be no more difficulty of proving their falsity on the trial than before them. And here is to be found a decisive test of the necessity of having the proof sustain all the averments of the indictment. Unless it does, the grand jury may indict for one offence, and the traverse jury convict for another. This actually has occurred in the present case. That the grand jury would have indicted for what the petit jury have convicted, or vice versa, is what may be surmised, but never can be known; consequently that great principle of security for personal liberty, which requires the concurrence of both in the same facts to produce a conviction, has not been observed.

I have another strong objection to the conviction, which is found in the belief that the false declarations proved were not,

under the circumstances in which they were made, false pretenses within the meaning of the statute. They were direct answers to distinct interrogatories put to the defendant, and are, I think, distinguishable from those artfully contrived stories, against which only, in my opinion, the statute was designed to guard. To say, as in this case, that an untrue reply to an inquiry made of a person how much he is worth, or whether he is embarrassed, is what the statute means by a false pretense, is to give to it a sweeping and mischievous construction, a construction which if carried out to all cases it would reach, no court could enforce; no community could tolerate. I admit with Lord Kenyon, 3 T. R., 102, that the offence created by the statute is described in terms extremely general, and that there is difficulty in drawing a distinct line between the cases to which it does and to which it does not apply. But this very admission of Lord Kenyon, made many years after the statute was in force, proves what till very lately has never been doubted, that a bare naked lie, unaccompanied with any artful contrivance, is not what the statute denominates as false pretense. If it were, Lord Kenyon's remark would be altogether unfounded; for in that case there could be no difficulty in drawing the line, indeed there would be no line to draw. At common law, no mere fraud, not amounting to a defined felony, was an indictable offence, unless it affected the public. Lord Mansfield observed, that "an offence, to be indictable, must be such a one as affects the public;" and he instanced the use of false weights and measures in the course of general dealing, fraud by means of false tokens, etc. But fraud by a false token, designed to cheat only the individual defrauded, was not indictable at common law; it must be a false token designed to affect the public generally, such as false weights and measures, counterfeit marks on goods, etc. To meet the insufficiency of the law in this respect, the statute 33 Henry VIII., was passed, making fraud on individuals, by means of privy tokens, misdemeanors. Under this statute it was settled that, to constitute a token, it must be something real and visible—as a ring, a key, etc.; but as this statute did not reach cases of fraud effected by verbal misrepresentation, however ingenious in their contrivance and well fitted they might

be to deceive the most wary, and a case of the most flagitious fraud occurring, where the perpetrator went unwhipped of justice because there happened to be no token used, notwithstanding the means that were used were equally fitted to throw a cautious man off his guard, the statute of 30 Geo. II., called commonly the statute against false pretenses was enacted. From this statute the term false pretenses, found in our own statute, was taken; and the connection in which it is placed in our statute shows plainly that it was adopted there with regard to the circumstances which, in the original English statutes, attached to it a particular and technical meaning. Our statute, 2 R. S., 677, § 58, reads: "Every person who, with intent to cheat or defraud another, shall, designedly, by color of any false token or writing, or by any other false pretenses," etc. The inquiry here is whether "any other false pretenses" means any false assertion, however bald and naked it may be—as in the present case, where the defendant, on being asked if he was any way embarrassed, replied he was not—or means such false pretenses as would naturally have an effect on the mind of the person to whom it was addressed, equivalent to that of a false token. The history of the adoption of the term, leaves me with no doubt that the latter is its statutory meaning. It indeed is not as clear as it has been assumed to be, that the common lexicographical meaning of pretenses is assertion. An authorized definition of it is "a delusive appearance produced by false representations;" and this comes much nearer to my notion of its statutory meaning, than any definition does which confounds it with a naked falsehood.

It was many years after the act of 30 George II., before the English courts made any considerable advance towards the construction that is now so much favored. Young v. The King, 3 T. R., 102, may in this respect be considered a pioneer case; and when the facts in it are compared with those of some modern cases, it will be seen how fast of late the new doctrine has been traveling. In that case four persons conspired to defraud another, by concertedly and falsely representing to him that a large bet had been laid with a colonel in the army that a certain pedestrian feat would be performed, and that they, or some of them, had a share in the bet, thereby inducing him to advance

to one of them a sum of money, and become a shareholder in the wager. This, which in truth was indictable at common law as a conspiracy, was held to be within the statute, and the rule was then laid down, that when a party has obtained money or goods, by falsely representing himself to be in a situation in which he was not, or by falsely representing any occurrence that had not happened, to which persons of ordinary caution might give credit, he was guilty of the offence. This rule the supreme court adopted, without argument or explanation, in the case of The People v. Johnson, 12 Johns. R., 292, and it has been gradually enlarging itself, down to the present case. The rule, as originally announced and applied, is not perhaps exceptionable, except for its vagueness and great liability to abuse. It meant, in the case, where it was first applied, a false representation with circumstances fitted to deceive a person of common sagacity, exercising ordinary caution. It is now construed to mean any false declaration by which any person has been deceived. The construction adopted in this case is, I am persuaded, not only an incorrect but a mischievous construction of the statute—a construction which, if strictly maintained, would overflow our courts with criminal prosecutions, and our jails and penitentiaries with convicts; the whole penal code, beside, would not be half so burthensome to execute, or half so fruitful of convictions; most of the common dealings of life might give birth to complaints before grand juries, and every exchange of property, from a ship's cargo to a barrel of flour, and even less, might afford occasion for a public prosecution. The principle that has been advanced, in the opinion we are reviewing, is that "where falsehood has had a material effect to induce a person to part with his property, the offence has been committed." Apply this rule, not only to the great exchanges of property, but to the innumerable and comparatively insignificant dealings of men to every swap of horses—in fine, to every transaction by which property is transferred, a note given, or money paid—and no man could count the cases it would reach. Merchants and others, in the habit of giving credit, or incurring great risks for the chance of great profits, might at first be gratified with a rule that enabled them to enforce collections by the terrors of a criminal prosecution;

but when "even-handed justice commends the poisoned chalice to their own lips," and they shall find themselves arraigned at the bar of criminal justice for every misrepresentation of the cost, quality, saleableness or value of every article they have sold, they too will be ready to exclaim, "'Tis rigor, and not law."

It can be said, I know, there will be no difficulty if men are honest and tell the truth. All will admit the obligation of truth and honesty; all have admitted them from the beginning of time; but how feeble have human laws proved in their efforts to enforce them. Does it follow, if men are not honest, and will not tell the truth, that they are to be arraigned, and tried, and convicted as felons? What scheme of criminal jurisprudence could carry out this principal? What prison could contain the convicts? We have it from the highest authority that by nature "all men are liars," and a master judge of the human character has said, that "to be honest, as the world goes is to be one man picked out of ten thousand." To punish as a crime, then, what the multitude of offenders make a custom, is to attempt what we can never hope to execute. It is the remark of a profound philosopher, that "the operation of the wisest laws is imperfect and precarious; they seldom inspire virtue; they cannot always restrain vice; their power is insufficient to prohibit all that they condemn, nor can they always punish the actions which they prohibit." Though the laws will not justify, yet they must recognize the frailties and imperfections of human nature, and they do deal with men as beings, subject to propensities and passions which they may aid to restrain, but which it is impossible to extirpate. How inconsistent it would be, when the law will not receive a man's oath if he has sixpence at stake upon it, that it should send him to the state's prison for an untrue answer to an inquiry into his pecuniary affairs, which he may have the strongest motive for concealing. And how disturbed and uncomfortable would be the condition of a community like ours, where traffic and credit are infinitely ramified and unceasingly active, if every person dissatisfied with a bargain, or disappointed by a misplaced confidence in the responsibility or punctuality of another, shall be quickened, by the prospects of redress or revenge,

to recollect some untrue representation made in the course of the transaction, stimulated by the hope of rescinding a bad bargain or of securing a doubtful debt, or irritated by the unexpected loss of what he had supposed a good one, how natural it is that he should persuade himself that "falsehoods had a material effect to induce him to part with his property;" and prompted by an opinion which interest or irritation had created, first to threaten a criminal prosecution, and afterwards, if the terror of it proved unavailing, to sustain it by testimony always colored, and sometimes wholly composed by his passions. It is dangerous to give one man such power over the reputation and personal liberty of another. If possessed, it would be often abused; and it is inevitable that perjuries would be multiplied, and injustice and rank oppression promoted.

I cannot concede or conceive that a construction is sound, or fitted to advance the general welfare, which proposes to protect property from loss by impositions which the owners can easily guard against, and expose reputation and liberty to invasions which no prudence or integrity may always repel. Besides, it is an utopian idea, that the sanctions of criminal justice can be made co-extensive with moral delinquencies. However agreeable to our sentiments of natural justice it might be to punish every immoral act, it would be quixotic to attempt it. No community ever assumed the obligation of protecting, by penal laws, every member of it from the consequences of his own credulity, imprudence or folly; and if any one should, it would be but following "false images of good," that could make no promises perfect. It is impossible for the public to sustain the burthen of redressing every injury or loss which individual credulity or cupidity may bring upon itself. The most it can do, and what by the statute under consideration it proposes to do, is to protect individuals from those ingeniously contrived frauds and unusual artifices against which common sagacity and an ordinary experience of mankind will not afford a sufficient guard. Beyond this men must trust to their own prudence and caution, with such aids and redress as may be obtained from the civil tribunals.

For all and each of the objections I have stated, I am for reversing the judgment of the supreme court.

Opinions were also delivered by Senators Edmonds, Edwards and Maison, concurring with the Chancellor and Senator Tracy in their conclusions that the delivery of the goods on board the steamboat was an absolute delivery, and invested the purchaser with both the title and possession, and that consequently, under no possible view of the case, could the prisoner be considered as having *obtained* the goods by *false pretenses*.

On the suggestion of the Chancellor, the court agreed in the first instance to pass only upon the question whether the delivery of the goods on board the steamboat; under the circumstances of the case, was an absolute delivery, and invested the purchaser with the title as well as the possession of the goods; and on the question being put, the members of the court unanimously expressed the opinion that the delivery was absolute. Whereupon the judgment of the supreme court was reversed.

Judgment reversed.

MARANDA v. STATE.

(44 Texas, 442.)

FALSE PRETENSES.—An indictment for false pretenses must allege that the defendant *knowingly* made the false pretenses.

MOORE, A. J. The motion in arrest of judgment should have been sustained. Knowledge of the false pretenses by means of which money or property is fraudulently obtained, is an essential constituent of the offence with which appellants are charged. Without proof that they knew that the pretense was false, evidently they should not be convicted. And although the word "knowingly" is not one of the statutory

words used in defining the offence, still as the offence, as defined by the statute, clearly requires that it shall be proved, we think, by the rules of correct pleading, it should be averred in the indictment. And so it is held by courts of the highest authority and standard commentators. Regina v. Philpotts, 1 Car. & Kir., 112; 2 Bish. Cr. Proc., sec. 172. The necessity for such an averment in the indictment has been clearly recognized by this court in the opinion of Mr. Justice DEVINE, in the case of State v. Levi, 41 Tex., 563. The judgment is reversed and the cause remanded.

Reversed and remanded.

PEOPLE v. JACOBS.

(35 Mich., 36.)

FALSE PRETENSES.—It is sufficient to allege that the party defrauded was induced by the false representations to part with his money.

The trial judge should charge the jury to disregard immaterial representations.

Statements, as to the value and location of lots, are matters of opinion, and not within the statute.

The case is sufficiently stated in the opinion of the court.

GRAVES, J. Jacobs was convicted on a charge of having obtained money of one Barts by false pretenses, and the case comes here on exception before judgment.

Many exceptions seem to have been taken, but much the larger portion are properly abandoned. There are some others it would be desirable to consider if the record was in better shape. Jacobs called on Barts to borrow five hundred dollars, and proposed to secure him by mortgage on land owned by his wife, Mrs. Jacobs. After some talk the loan was made, but Barts

retained ten dollars, by understanding, to pay his expenses in going subsequently to view the land. Mrs. Jacobs gave her mortgage, together with her note, to Barts for the money. In this negotiation, as charged in the information, Jacobs made the false representations concerning the land mortgaged. It alleges that he falsely and feloniously pretended to Barts that Mrs. Jacobs was owner of lots thirty-six, thirty-eight, forty and forty-two, in block three, in Harriet M. Clement's subdivision of the south one-third of fifteen acres, lying in a square farm in the northwest corner of the northeast quarter of section twelve, in town six south, of range twelve west, according to the recorded plat; that the lots were situated within the city limits of the city of Grand Rapids; were on the street running directly from the business part of the city to the fair grounds, near the city limits; were between such fair grounds and the business portion of the city; that the lots were nicely located; were quarter-acre lots and constituting one square acre; that they would sell at any time at from twelve hundred dollars to fifteen hundred dollars cash; were worth much more than that, and were entirely free from all incumbrance. These pretenses are afterwards alleged to have been severally false. On the opening of the trial it was objected that the information set up no offence. The ground of the objection was not explained. But at a later stage of the trial, the reason for the objection was stated to be, that the information did not state in words that Barts relied on the representations. The objection is not much insisted on, and is not tenable.

The allegations in this particular are formally sufficient. It was not essential to charge in express terms that Barts gave credit to the false pretenses. That he did so was a necessary implication from the allegation that he was induced by the representations to part with his money. State v. Penley, 27 Conn., 587.

The court charged that if the jury believed, from the evidence, that any of the pretenses charged were proved to be false and fraudulent, and were part of the moving cause which induced Barts to part with his money, and that he would not have parted with it had not such false pretenses been made, they would be justified in finding him guilty.

The instructions must have been understood as assuming that each distinct pretense set up was a valid ground of charge, and on which a conviction might rest, if found false and fraudulent, and operative in any degree on Barts, to cause him to make the loan.

No instruction was given that any representation laid as a false pretense could not legally be so laid, nor any instruction that any representation laid as a pretense was unproved, or any instruction to preclude the jury from resorting to the whole evidence, and finding from it that all the representations laid as pretenses were in fact made. Hence, if any representation laid as a false pretense could not be lawfully impressed with that character, the jury were, in effect, permitted to convict upon it.

Now, the alleged pretense that the lots were "nicely located," was a distinct pretense in the information. But it was not such a representation as could be made the subject of criminal prosecution as a false pretense. I could not convey or be understood as conveying any definite idea at all. There is no standard for trying the accuracy of such a statement. What is a nice location to one may be far otherwise to another, and even to the mind of one using it the expression is vague and indeterminate. No one can be supposed to accept such a representation as an assertion of the existence of some fact or circumstance sufficient to cause him to change his situation in reliance on it, and the law cannot measure or weigh people's fancies.

The alleged representation concerning the value of the lots to be mortgaged cannot be construed as anything beyond a matter of opinion, and it is not to be supposed that the expression was understood in a sense more absolute. There is no reason for implying that Barts relied upon it, or was in any way or to any extent duped by it. Bishop v. Smalls, 63 Me., 12; Mooney v. Miller, 102 Mass., 217; Long v. Woodman, 58 Me., 49, and cases cited. These allegations were accordingly not sufficient as grounds of charge, and it was error to allow the jury to regard them as though they were. There are several topics which would require discussion and explanation before a jury, but are hardly proper for consideration here.

The conviction must be set aside, and in case another trial

is deemed expedient, no doubt the prosecution will see to it that the proceeding is quite differently shaped.

The other justices concurred.

SKIFF v. THE PEOPLE.

(2 Parker C. R., 139.)

FALSE PRETENSES.—It is sufficient to allege that the property was obtained by false pretenses, without setting forth the means employed.

Where the indictment charged the pretense of owning two tracts of land designating them as the "Home farm," and the "Van Shaack farm," the description was held to be sufficiently definite.

It is not necessary to negative all the pretenses in an indictment, nor to prove all that are negatived.

Whether the prosecutor used ordinary prudence is a question for the jury.

The county where the property was obtained, not where the contract was made, is the proper county for the trial.

The case is sufficiently stated in the opinion of the court.

By the court, WRIGHT, J. The first objection is to the sufficiency of the indictment; the second to the proof sustaining it. Under the two general objections, we are to consider the case.

1. As to the indictment. It alleges that the defendant, with the intent to cheat and defraud one Samuel Hale, made certain false pretenses, which pretenses are set forth with particularity in the pleading; that Hale, believing such false pretenses and representations, was induced by reason of them to deliver, and did then and there deliver to the defendant, thirty-nine head of cattle, of the value of $600, the property of Hale; and the defendant did designedly receive and obtain the

cattle by means of the false pretenses, and with intent to cheat and defraud Hale. The pleadings charge in the language of the statute, that the defendant with intent, etc., did obtain from Hale certain personal property, etc. That Hale was induced by the false pretenses to deliver, and did deliver to the defendant, and that the defendant did receive and obtain, certain cattle. It does not, however, in terms allege a sale of the cattle from Hale to Skiff, or any other bargain, by which the property was transferred from the one to the other; and accordingly, when the public prosecutor proposed to show a bargain and a sale of the cattle, by which they were transferred, the defendant objected, on the ground that no bargain and sale were alleged in the indictment. We are of the opinion that the indictment is not defective in this respect. It sufficiently alleges the facts constituting the crime. The offence consists in obtaining the property, whether this be through a sale or bailment, or in any other way. The fact is specifically alleged that the cattle were delivered to, and obtained by the defendant by means of the false pretenses, that is, that they were transferred to him. And under this allegation, evidence of the manner of the transfer was admissible.

Another objection taken to the proof of any bargain and sale of the cattle, was that the property and its location was insufficiently described in the indictment to admit of any proof thereof. From the indistinctness of this objection, it is a little difficult to say what property is alluded to; but the counsel for the defendant tells us that he referred to the two pieces of land which Skiff, as the pleadings allege, pretended to own. The indictment charges the pretense of owning two pieces of land in the town of Easton, in the county of Washington, designating them as the Home farm or place, and the Van Schaack farm. This description seem to us to be sufficiently definite. It is unlike the case of The People v. Lord, (9 Barbour, 675), where the indictment described the lands generally to be in the state of Texas.

Hale parted with his property on credit. It was part of the agreement by which Skiff obtained the cattle, that he was to give a note payable at a bank on which Hale could get the money. On the trial, the district attorney asked the witness

if the note was paid; to this question the defendant's counsel objected, on the ground it was not alleged in the indictment that the note was not paid. The court overruled the objection, and the defendant's counsel excepted. There was no error in this. It was no reason for rejecting the inquiry, that the fact of non-payment had not been alleged in the indictment. Had the objection been that the offence charged required no proof of the non-payment of the note to make it complete, and consequently such proof was immaterial, there might have been more force in it. But then we could hardly have come to the conclusion that it was wholly irrelevant. It tended at least slightly, in connection with other proof in the case to characterize the quo animo of the transaction on the part of the defendant.

There is nothing in the objection that the indictment does not falsify all the pretenses. It is not necessary to negative all the pretenses in the indictment, or to prove all that are negatived to be false. 9 Wend., 182; 11 Wend., 557.

2. As to the sufficiency of the proof. At the close of the testimony, the defendant's counsel moved for his discharge, for the reasons: 1st. That by the evidence it appeared that Hale parted with his property under the understanding, on his own part, that he was to receive a good indorsed note, and not on the faith of the representations made by Skiff. 2d. That Hale had not shown ordinary diligence to ascertain the defendant's circumstances, although it was proved that he had abundant means within his power to ascertain the same. 3d. That the court of sessions had no jurisdiction to try the cause; and that it could only be tried in the county of Rensselaer, where the offence, if any, had been committed. The court denied the motion for discharge, holding that the question raised involved matters of fact for the consideration of the jury.

If the fact had stood out in the case uncontroverted, that Hale was not influenced in parting with his property by the false pretenses and representations of the defendant, but that he relied on an agreement that he was to receive a good indorsed note, the court should have discharged him or at least directed the jury to acquit. But this was not so. Hale expressly testified that he was induced by the defendant's representations

of his solvency, his ability to pay, etc., to let him have the cattle, and that except for such representations being made, he should not have parted with his property.

The case does not show that Hale did not use ordinary prudence and diligence in inquiring into the truth of the pretenses. He inquired of Tabor, the landlord and neighbor of the defendant. But the degree of prudence, and the sufficiency of the pretenses to deceive, were questions of fact for the jury, and they have found against the defendant.

I do not think there is any force in the point as to jurisdiction. The transaction took place in the county of Washington. It was there the pretenses were made and believed, and the cattle weighed and delivered. The sale was there consummated and possession taken of the property. The waiving, by Hale, of the giving of the note until the parties arrived in Troy, can not have the effect to change the place of making the representations and the delivery of the cattle. It is sufficiently clear from the evidence, that the offence for which the defendant was indicted, was committed in the county of Washington; that there the defendant obtained the property from Hale, and of course the court of sessions of that county had jurisdiction.

The judgment of the court of sessions of the county of Washington is affirmed.

KELLER v. STATE.

(51 Ind., 111.)

FALSE PRETENSES.—An indictment alleging that the prisoner falsely pretended that he had recently sold certain real estate, should give the name of the purchaser or describe the property.

Where the pretenses were that certain land was not subject to any prior

lien, an allegation that the property was subject to prior liens, without describing them, is insufficient.

Representations relating to future events are not within the statute.

BUSKIRK, J. The appellant was indicted in the court below for obtaining property by false pretenses. The indictment contains two counts, which, as to the false pretenses charged, are nearly identical. The appellant moved to quash each count, but this motion was overruled, and he excepted. He pleaded not guilty, and was tried by a jury and was found guilty. The court overruled the motion in arrest of judgment and for a new trial, to which exceptions were taken. Judgment was rendered on the verdict.

The appellant has assigned for error, the overruling of this motion to quash the indictment, in arrest of judgment, and for a new trial.

The first question for the consideration of the court relates to the sufficiency of the indictment.

The first count, omitting the formal parts, is as follows: "The grand jurors of Tipton county, in the state of Indiana, good and lawful men, duly and legally impaneled, sworn and charged in the Tipton circuit court of said state, at the spring term of the year 1875, to inquire into felonies and certain misdemeanors in and for the body of the said county of Tipton, in the name and by the authority of the state of Indiana, on their oath do present that one Robert H. Keller, late of said county, on the 13th day of October, in the year 1874, at and in the county of Tipton, and state of Indiana, did then unlawfully, feloniously, designedly and with intent to defraud one George W. Boyer, falsely pretend to the said George W. Boyer, that he, the said Robert H. Keller, had been the owner, and had recently sold to a certain party a certain piece of real estate, to-wit, a house and lot of ground, situated in the city of Indianapolis, in the county of Marion, in the state of Indiana, for a large sum, to-wit, the sum of thirty-five hundred dollars; that said real estate was of great value, and fully worth the said sum of thirty-five hundred dollars, and that there was still due the said Robert H. Keller, upon the purchase money of said house and lot of ground so sold as aforesaid, the sum of five hundred dollars, and that there was no lien or incum-

brance on said house or lot of ground, except the said lien of five hundred dollars, for the purchase money thereof, due the said Robert H. Keller, as aforesaid, and that if the said George W. Boyer would sell and deliver to the said Robert H. Keller, goods, chattels and property to the amount of five hundred dollars, he, the said Robert H. Keller, would pay the said George W. Boyer therefor, in and with a promissory note given and being for the said sum of five hundred dollars, the purchase money due the said Robert H. Keller, upon the said house and lot of ground as aforesaid, and to be made payable to the said George W. Boyer, on the 1st day of March, in the year 1875, and secured by a mortgage upon the said house and lot of ground, and that the said lien of five hundred dollars, for the purchase money for the said house and lot of ground, and the said mortgage securing the same, was all and the only lien whatever upon the said house and lot of ground, and that the said house and lot of ground were of the full value of thirty-five hundred dollars, and ample and sufficient surety for the payment of the said purchase money as aforesaid, and that the note executed as aforesaid to the said George W. Boyer would be of the full value of and worth the sum of five hundred dollars.

By means of which said false pretenses then and there made to the said George W. Boyer, by the said Robert H. Keller, as aforesaid he, the said Robert H. Keller, did then and there, with intent to cheat and defraud him, the said George W. Boyer, unlawfully and feloniously obtain and receive from the said George W. Boyer, the following goods, chattels and property, to-wit: One spring wagon, of the value of two hundred and twenty-five dollars; one two horse wagon, of the value of one hundred and fifty dollars; one log wagon of the value of one hundred and twenty-five dollars, all of the said goods, chattels and property, being of the aggregate value of five hundred dollars; and for the goods, chattels and property of the said George W. Boyer, and in payment for the said goods, chattels and property so obtained and received by the said Robert H. Keller, from the said George W. Boyer, as aforesaid, he, the said George W. Boyer, did receive the said five hundred dollar note, fully relying upon and believing said false and

fraudulent pretenses and representations made to him by the said Robert H. Keller, as aforesaid, and believing them to be true; whereas, in truth and in fact, the said Robert H. Keller had not then recently sold to a certain party a certain piece of real estate, to-wit, a house and lot of ground situated in the city of Indianapolis, in the county of Marion, in the state of Indiana, for a large sum to-wit, for the sum of thirty-five hundred dollars, as aforesaid, and that said house and lot of ground were not then of the value or worth thirty-five hundred dollars as aforesaid; and that the said lien and mortgage of five hundred dollars on the said house and lot of ground for the purchase money thereof as aforesaid was not the only lien and incumbrance then upon said house and lot of ground, but there were various and numerous other liens thereon, older and prior to the said lien of five hundred dollars, amounting in the aggregate to two thousand dollars, and greatly exceeding the value of said house and lot of ground; and that said house and lot of ground were not then of sufficient value to amply and sufficiently secure the payment of the said five hundred dollar note, as aforesaid; and that said note, executed to the said George W. Boyer, as aforesaid, was not worth or of the value of five hundred dollars, but was in fact entirely worthless, and of no value whatever, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the state of Indiana."

We proceed to the examination of the first error assigned. The first count in the indictment has been set out, and as it is quite lengthy, we will summarize its averments and negations.

1. It is averred that Robert H. Keller (falsely pretended that he) had been the owner, and had recently sold to a certain party, whose name is not given, nor is it averred that this name was unknown to the jurors, a certain piece of real estate, to-wit, a house and lot of ground situated in the city of Indianapolis, county of Marion, and state of Indiana, for a large sum of money, to-wit, for the sum of thirty-five hundred dollars. There is no further description of such real estate or any averment that it was unknown to the jury.

2. That said real estate was of the value of thirty-five hundred dollars.

3. That there was still due the said Robert H. Keller, upon the purchase money of said house and lot the sum of five hundred dollars.

4. That there were no liens or incumbrances upon the said house and lot except said sum of five hundred dollars for the unpaid purchase money, and the mortgage securing the same.

5. That the said house and lot of ground were of the full value of thirty-five hundred dollars, and ample and sufficient security for the said sum of five hundred dollars.

5. That the note which was executed by the purchaser of said real estate to George W. Boyer, to whom said representations were made, and in reliance upon which he had sold the said Keller certain personal property, would be of full value, and worth the said sum of five hundred dollars.

The first averment is very vague and indefinite. There is no sufficient description of the real estate alleged to have been owned and sold by the appellant. Nor is the name of the purchaser given. Criminal charges must be preferred with reasonable certainty, so that the court and jury may know what they are to try, of what they are to acquit or convict the defendant, and so that the defendant may know what he is to answer, and that the record may show, as far as may be, of what he has been put in jeopardy. The averments should be so clear and distinct that there could be no difficulty in determining what evidence was admissible under them. It fully appears from the evidence in the record that the appellant had owned and transferred lot No. 46, in Yande's subdivision of outlot No. 129, in the city of Indianapolis, county of Marion, and state of Indiana. This evidence was admitted over the objection and exception of appellant. Its admission was objected to on the ground that the averments of the indictment were neither specific nor broad enough to render such evidence admissible. If the appellant, in his representations to Boyer, did not describe the property which he had owned and sold, the description of the property could not have been introduced in that portion of the indictment, but the first averment as above set out might have been preceded with or followed by a statement that the appellant had owned and recently sold lot 46 in Yande's subdivision of outlot No. 129, in the city, county and state

aforesaid, and that the representations relied upon were made in reference to such property. If the name of the purchaser of such lot was known to the grand jury, it should have been stated, but if unknown that fact should have been averred.

The negation to the first averment is as follows:

"Whereas, in truth and in fact, the said Robert H. Keller had not then recently sold to a certain party a certain piece of real estate, to-wit, a house and lot of ground situated in the city of Indianapolis, in the county of Marion, and state of Indiana, for a large sum of money, to-wit, for the sum of thirty-five hundred dollars as aforesaid, and that said house and lot of ground were not then of the value of, or worth thirty-five hundred dollars."

By the above averment and negation, the guilt of the appellant is made to depend upon the question whether the house and lot of ground had been sold to a certain party for the exact sum of thirty-five hundred dollars, and whether they were worth that exact sum, when it should have been made to depend upon whether the appellant had sold said house and lot of ground to any person for said sum, and whether the property was of such value as to amply secure said sum of five hundred dollars alleged to be due.

The second averment is, that appellant represented that said real estate was of the value of thirty-five hundred dollars. It is contended by counsel for appellant that a statement of the value of property is a mere expression of opinion or judgment, about which men may honestly differ, and if there is no fixed market value, an estimate that is too high will not constitute a criminal false pretense.

The question discussed by counsel does not squarely arise upon the averment in the indictment, and hence we do not consider or decide the question, preferring to wait until it arises on the evidence or instruction of the court based upon the evidence.

There is no negation of the third averment; hence, it is admitted to be true, and no evidence would be admissible to prove it to be untrue.

The fourth averment and its negations are insufficient. The negation to the fourth averment does not set out or describe

the liens that constitute the prior incumbrances. How was it possible for the appellant to prepare for trial under such an averment and negation? How could he show, on trial, that the liens proved by the state had no valid existence, or had been paid off? He would have no notice of the liens relied upon until the evidence was offered by the state. It would be contrary to well established principles to allow evidence to be given upon a material issue, tending to fasten fraud and falsehood upon the party, without any averment or notice in the indictment of the facts sought to be proved. The People v. Miller, 2 Parker C. C., 197.

The fifth averment and its negation are sufficient.

The sixth relates to a future event, and cannot constitute a criminal false pretense. Bishop, in sec. 420 of his Crim. Law, vol. 2, p. 230, says: "And both in the nature of things, and in actual adjudication, the doctrine is, that no representation of a future event, whether in the form of a promise or not, can be a pretense, within the statute, for the pretense must relate either to the past or to the present." See Jones v. The State, 50 Ind., 473, and authorities there cited.

Although some of the averments are sufficient, yet, standing alone and disconnected with the other averments, they are not sufficient to constitute a good indictment.

There is a direct repugnancy in the averments of the indictment, which renders it fatally defective. It is alleged, "that if the said George W. Boyer would sell and deliver to said Robert H. Keller goods, chattels and property to the amount of five hundred dollars, he, the said Robert H. Keller, would pay the said George W. Boyer therefor, in a promissory note, given and being for the said sum of five hundred dollars, the purchase money due the said Robert H. Keller upon the said house and lot of ground, as aforesaid, and to be made payable to the said George W. Boyer on the first day of March, in the year 1875, and secured by mortgage upon said house and lot of ground," etc.

It is alleged that Keller was to pay Boyer in a note given and being for the said purchase money, and it is then averred that said note is to be made payable to the said Boyer, and secured by a mortgage upon said real estate. In The State v.

Locke, 35 Ind., 419, the indictment was held bad because it charged that the pretense was made to induce Kiser to become the security of Locke, on a six hundred dollar note, but that, instead of going security, he became a principal, and made a note for six hundred dollars, payable to Locke. The indictment was held ambiguous and uncertain, and an indictment must be direct and certain, as it regards the party and the offence charged. Whitney v. The State, 10 Ind., 404; Walker v. The State, 23 id., 61; Bicknell's Crim., Prac., 90, 93, 94; The State v. Locke, supra; The Commonwealth v. Magowan, 1 Met., Ky., 368; The People v. Gates, 13 Wend., 311.

It is a settled rule of criminal pleading that the offence charged must be proved in substance as charged. This cannot be done in the averment under examination. The two averments are directly repugnant. It is averred that the note for five hundred dollars had been given to Keller, and was secured by mortgage. It was shown upon the trial that, at the time the representations were made, Keller had agreed upon a sale of his house and lot of ground, in the city of Indianapolis; but the deed had not been made, nor had the notes and mortgage been given, and that these facts were known to Boyer, and it was then agreed that a note for five hundred dollars should be made payable directly to Boyer, and secured by mortgage; and it also appears that this was done. Such proof could not sustain the averments of the indictment.

We are clearly of the opinion that the indictment cannot be sustained. It is ambiguous, uncertain, repugnant, and defective in its averments and negations.

The judgment is reversed, with costs; and the case is remanded, with directions to the court below to sustain the motion to quash. The clerk will give the proper order for the return of the prisoner.

COMMONWEALTH v. GRADY.

(13 Bush., Ky., 285.)

FALSE PRETENSES.—The pretense that a house and lot were unincumbered, when, in fact, they were subject to a recorded mortgage, is not a false pretense within the statute.

Where a party has means of detecting the imposition at hand, and could, by an exercise of common prudence, have protected himself, there can be no conviction.

Judge ELLIOTT delivered the opinion of the court.

This is an indictment charging the appellant with having obtained the money and property of Prisley O'Bannon, by the false pretenses of fraudulently representing to O'Bannon that he was the owner of a house and lot in Owen's addition to the town of Eunice, and that the house and lot so owned were free from lien of mortgage to any one.

By the misrepresentations it is charged that appellee obtained from O'Bannon $125 in money and some promissory notes for the house and lot; and that it turned out, on investigation, there was a recorded mortgage on the property, which had been executed by appellee to Lotty Kelso.

The indictment failed to state the amount of the mortgage lien of Mrs. Kelso; for if it was merely nominal the appellee may have made the representations, charged with no intent of defrauding O'Bannon, but with the intention of removing the incumbrance with a part of the money received from him. But we agree with the opinion of the lower court, that the indictment was insufficient for several reasons.

In the case of the Commonwealth v. Haughey, 3 Met., 223,

it was charged that Haughey obtained credit on a note he owed R. R. Jones, upon the false and fraudulent pretense and representation that a large quantity of tobacco, which Jones then purchased, would average in quality with a sample which Haughey then and there exhibited to said Jones.

This court affirmed the judgment of the lower court, dismissing the indictment, and say that a common caution on the part of Jones would have protected him from any injury; he could, without trouble, have retained his note till the tobacco was delivered, and if, upon an offer to deliver it to Haughey, it was not equal in quality to the sample exhibited, he could have rejected it.

So in this case, O'Bannon could have refused to execute and deliver his note to appellee, or even to pay him the $125 in money till he stepped to the clerk's office, and ascertained from the records of the Henry county court where the title to the house and lot was such as represented.

In Wharton's Criminal Law, vol. 2, section 2129, the doctrine is laid down that "a representation, though false, is not within the statute (meaning the statute against obtaining money and property by false pretenses), unless calculated to deceive persons of ordinary prudence and discretion;" and this author further says that the statutes against obtaining money, etc., by false pretenses ought not to be so interpreted as to include a case where the party defrauded had the means of detection at hand.

Here O'Bannon had the means of detection at hand, for, by a visit to the clerk's office, he could soon have ascertained whether the appellee had the unincumbered title to the house and lot as represented by him.

Wherefore the judgment is affirmed.

STATE v. ANDERSON.

(47 Iowa, 142.)

FALSE PRETENSES.—Where, by the agreement between the prosecutor and the defendant, the defendant gets no title to the property which is delivered to him, the crime of obtaining property by false pretenses is not committed.

SERVERS, J. The indictment charged "that * * defendant did obtain from the St. Paul Harvester Works, through J. C. Yetzer * * * one Elward harvester, of the value of one hundred and ninety dollars." The defendant pleaded not guilty. The false pretenses used for the purpose of obtaining said property were in writing, and were as follows:

"$115.00. ATLANTIC, Iowa, July 12, 1875.

"For value received, on or before the first day of October, 1876, I, the subscriber, of Benton township, county of Cass, and state of Iowa, promise to pay to the order of the St. Paul Harvester Works one hundred and fifteen dollars, at the Cass County Bank, in Atlantic, with interest at ten per cent. per annum, from date until paid, and, in addition, I will pay five per cent. attorney's fee, if suit is commenced on this note.

"The express condition of the sale and purchase of the Elward harvester, for which this note is given, is such that the title, ownership or possession does not pass from said St. Paul Harvester Works until this note is paid in full; that said St. Paul Harvester Works shall have full power to declare this note due, and take possession of said machine at any time they may deem themselves insecure, even before the maturity of this note. For the purpose of obtaining credit, I, P. H. Anderson, hereby certify that I own, in my own name, forty acres of land in section thirty-one, township of Benton, county of Cass, and state of Iowa, with twenty-five acres improved, worth $1,000, which is not incumbered by mortgage or otherwise, except —— ——. I own ($800) dollars worth of personal property over and above all indebtedness. P. H. ANDERSON.

"P. O. Atlantic, county of Cass, state of Iowa."

The "state introduced evidence which tended to show the representations made and their falsity, and also that defendant purchased of the St. Paul Harvester Works a harvester, which the agent of the company was induced to sell and deliver by and through said representations."

After the state rested, the defendant moved the court to "direct the jury to acquit the defendant, for the reason that it appeared by the contract the defendant did not obtain, by the alleged false representations, the title to or property in said harvester, but the same remained in the St. Paul Harvester Works company, and that said company, notwithstanding the delivery of the harvester to defendant, continued to be the owner of the same, with the right to resume possession thereof at any time," which motion was sustained, and the jury so directed. The correctness of this ruling is the only question to be determined.

The statute provides: "If any person designedly, and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods, or other property, * * * ." Code, § 4073.

In 3 Archbold's Criminal Practice and Pleading, 407, it is said: "In order to convict a man of obtaining money or goods by false pretenses, it must be proved that they were obtained under such circumstances that the prosecutor meant to part with his right to the property in the thing obtained, and not merely with the possession of it." This doctrine is recognized in 3 Greenleaf, § 160, and also, as we understand, in 2 Wharton on Criminal Law, § 2149.

The only case cited by the attorney-general, as being in conflict with these authorities, are Skiff v. The People, 2 Parker's Criminal Reports, 139, and People v. Haynes, 11 Wend., 558. The former has but little, if any, bearing on the question before us, and the latter was reversed in the The People v. Haynes, 14 Wend., 547, and it was then held, where a person sold goods to another on credit, and delivered the same on a steamboat designed by the purchaser, to be forwarded to his residence, that the sale became complete, and the title and possession vested in the purchaser. After such delivery the seller made the attempt to stop the goods while in transit, to prevent

which the purchaser made certain false representations, in consequence of which the seller did not persist in his attempt to seize the goods. The purchaser was indicted for obtaining the goods by means of false pretenses, and it was held he could not be convicted. It is evident, in the case at bar, that the seller did not intend to part with either the right of property or possession, for it is expressly provided in the contract of purchase and sale "that the title, ownership or possession, does not pass" until the note is paid, and the right "to declare the note due, and take possession of the machine at any time," was expressly reserved.

The defendant did not even obtain an unqualified right to the possession. The plaintiff, in a legal sense, parted with nothing. It is unnecessary to go as far as the rule laid down in Archbold, in order to sustain the ruling below. At least, we think the defendant must have obtained, by means of the false pretenses, either the title or the unqualified right of possession as between himself and his vendor, for at least some length of time. Here the delivery and resumption of the possession by the vendor could be at the same instant of time, or as near thereto as it was possible for the mind to act and determine.

Affirmed.

JONES v. STATE.

(50 Ind., 473.)

FALSE PRETENSES.—A business card which is not genuine is a false token.

The indictment must set out the contract which the prosecutor was induced to enter into, and allege that the prosecutor relied on the false pretenses.

Where a note obtained by false pretenses, was exchanged for a second note of the same tenor, held no defence.

BUSKIRK, J. The appellant was indicted for, and convicted in the court below of, obtaining the signature of Jeptha O. Mayfield, to a note payable to appellant, by false pretenses.

A motion to quash the indictment was overruled, and an exception taken.

A plea in abatement was filed, to which a demurrer was sustained, and an exception taken.

A motion for a new trial was overruled, and an exception taken.

A motion in arrest of judgment was overruled, and an exception taken.

The errors assigned are as follows:

1. That the court erred in overruling the motion to quash the indictment.

2. That the court erred in sustaining the demurrer to the plea in abatement.

3. That the court erred in overruling the motion for a new trial.

4. That the court erred in overruling the motion in arrest of judgment.

We will dispose of the assignments of error in the order stated. Did the court err in overruling the motion to quash the indictment? That portion of the indictment material to this question is as follows:

"That Edwin E. Jones, on the 14th day of January, 1875, at said county of Jefferson, feloniously, designedly, and with intent to defraud one Jeptha O. Mayfield, did falsely and feloniously pretend to the said Jeptha O. Mayfield that he, the said Edwin E. Jones, was the agent of a firm of persons in the city of Cincinnati, state of Ohio, doing business under the firm name of 'Mills, Spillmeyer & Co., at Nos. 368, 370 and 372 West Third street, in said city of Cincinnati;' that said firm were largely engaged in the manufacture of a certain implement called 'Herman's Improved Lifting Jack,' and that he, the said Edwin E. Jones, had authority from said firm to sell said lifting jack for the said firm, and to contract for and in behalf of said firm for the sale of said lifting jack by said Jeptha O. Mayfield, and did then and there feloniously, designedly, and with intent to defraud said Jeptha O. Mayfield,

exhibit to said Jeptha O. Mayfield a certain printed card of said firm of Mills, Spillmeyer & Co., and which said card was and is in the words and figures following: 'Mills, Spillmeyer & Co., manufacturers of Herman's Improved Lifting Jack, Nos. 368, 370 and 372 West Third street, Cincinnati, Ohio. Send orders for Herman's Lifting Jack, in accordance with contract;' and did falsely, felonously, designedly, and with intent to defraud said Jeptha O. Mayfield, pretend to said Jeptha O. Mayfield, that said card was the genuine card of said firm of Mills, Spillmeyer & Co., aforesaid; that said Jeptha O. Mayfield relied on said pretenses so made to him by said Edwin E. Jones, and by means of said false pretenses the said Edwin E. Jones did then and there feloniously, falsely, designedly, and with intent to defraud said Jeptha O. Mayfield, obtain from said Jeptha O. Mayfield, a note of the said Jeptha O. Mayfield for the sum of four hundred dollars which note is of the tenor following:

"$400. MADISON P. O., JEFFERSON COUNTY, January 14, 1875.

"Six months after date I promise to the order of E. E. Jones at the First National Bank, Indianapolis, Indiana, four hundred dollars with interest at the rate of —— per annum from date, value received, without any relief whatever from valuation or appraisement laws. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note. If this note is not paid at maturity, the undersigned agrees to pay the expenses of collection, including attorney's fees.

J. O. MAYFIELD."

"With intent then and there to cheat and defraud him, the said Jeptha O. Mayfield; whereas, in truth and in fact, the said firm of Mills, Spillmeyer & Co., were not engaged in the manufacture of the implements called 'Herman's Improved Lifting Jack,' and whereas, in truth and in fact, said Edwin E. Jones was not then and there the agent of said firm of Mills, Spillmeyer & Co., and did not then and there have any authority from said firm to sell said lifting jacks for said firm, and to contract for the sale of the same by said Jeptha O. Mayfield, for said firm, and whereas, in truth and in fact, the said card so exhibited as aforesaid and hereinbefore set forth, was not then and there the genuine card of said firm of Mills, Spillmeyer & Co., contrary to the form of the statute," etc.

Section 27, 2 G. & H. 445, reads as follows: "If any person

with intent to defraud, shall designedly, by color of any false token or writing, or any false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, transfer, note, bond or receipt, or thing of value, such person shall upon conviction thereof, be imprisoned," etc.

The gravamen of the crime consists in obtaining the signature of any person to any written instrument, or in obtaining from any person any money, transfer, note, bond or receipt, or thing of value.

The offence may be committed by two means; first, by color of any false token or writing; second, by any false pretenses. The word "token," in its ordinary signification, means "a sign" "a mark," "a symbol." The words "writing" and "written" includes printing, lithographing, or other mode of representing words and letters. Sec. 1, subdivision 9, 2 G. & H., 338.

The indictment in the present case attempts to charge that the signature of Mayfield was obtained to the note by means of a false token, and by pretending that he was the lawful agent of Mills, Spillmeyer & Co., and had authority from and in behalf of said firm for the sale of said lifting jack.

The first question is, whether the printed card set out in the indictment comes within the meaning of the words "token or writing," used in the statute.

Bouvier's Law Dictionary defines the legal meaning of the word "token" thus: "Token. A document or sign of the existence of a fact. Tokens are either public or general, or privy tokens. They are either true or false. When a token is false, and indicates a general intent to defraud, and is used for that purpose, it will render the offender guilty of the crime of cheating, 12 Johns., N. Y., 292, but if it is a mere privy token, as counterfeiting a letter in another man's name, in order to cheat but one individual, it would not be indictable. 9 Wend., N. Y., 182; 1 Dall., Penn., 47; 2 Const., So. C., 139; 2 Va. Cas., 65; 4 Hawks., N. C., 448; 6 Mass., 72; 12 Johns., N. Y., 293; 2 Dev., N. C., 199; 1 Rich., So. C., 244."

We think the token exhibited by the appellant was a general token, and indicated a general intent to defraud, and when accompanied by the false pretenses alleged in the indictment,

was calculated to deceive a person of ordinary intelligence and prudence.

It is very earnestly contended by counsel for appellant that the false pretenses set out in the indictment are not sufficient to constitute the crime attempted to be charged. The first objection urged to this part of the indictment is, that the word "pretended" is used instead of the word "represented." In our opinion, the objection is untenable. The word "pretense" is used in the statute defining the crime. The word "pretend" is the verb of the noun "pretense." The form of indictment given by Bicknell in his Criminal Practice, p. 341, uses the word "pretense." See Whart. Crim. Law, sec. 2144.

It is next urged that the indictment fails to aver any false pretense which was sufficient to induce a person of ordinary caution and prudence to execute his note for a large sum of money, and we are referred to the following adjudged cases: The State v. Magee, 11 Ind., 154; Johnson v. The State, 11 id., 481; The State v. Orvis, 13 id., 569.

In the first case cited, it was said: "The pretenses must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property, and to which a person of ordinary caution would give credit. A pretense, therefore, that a party would do an act he did not intend to do is not within the statute, because it is a mere promise for his future conduct. Roscoe Crim. Ev., 465, et seq.; 11 Wend., 557; 14 id., 547; 3 Hill, 169; 4 id., 9, 126; 19 Pick., 186. These authorities plainly show that any representation or assurance, in relation to a future event, may be a promise, a covenant, or a warranty, but cannot amount to a statutory false pretense."

In the second case cited, the indictment was held to be bad, because it was not averred that the checks were delivered to the prosecuting witness, and were by him received in payment for the harness. The case has but little, if any application to the present case.

The case of The State v. Orvis, supra, is in several respects much like the present case. In that case, the indictment was held to be bad, for the reason that it did not appear therefrom that there was any contract or agreement between the defendant and Smith, for the purchase by Smith of an agency to

sell the articles mentioned, or that Smith parted with his money for the purchase of an agency to sell, or any other interest in the articles named. In other words, that no connection was shown between the pretenses alleged and the obtaining of the money. In that case, the indictment after setting forth the false pretenses and negativing the averments, concluded as follows:

"By color and means of which said false pretense and pretenses, he, the said Charles B. Orvis, then and there, on," etc., "did unlawfully, feloniously, designedly and falsely obtain from said John F. Smith, forty dollars, then and there being the property of said John F. Smith, contrary," etc.

That portion of the indictment in the case in judgment is as follows:

"And by means of said false pretenses, the said Edwin E. Jones did then and there feloniously, falsely, designedly, and with intent to defraud said Jeptha O. Mayfield, obtain from said Jeptha O. Mayfield, a note of the said Jeptha O. Mayfield, for the sum of four hundred dollars, which note is of the tenor following," etc.

There is no averment that the said Mayfield was induced, by means of said false token and pretense, to purchase of said Jones the right to sell said lifting jack, and that in consideration of said purchase, he executed the note set out in the indictment. In other words, there is no connection shown between the false pretenses alleged and the obtaining of said note. It is not shown why or upon what consideration or for what purpose the note was executed. Suppose Jones did exhibit the card of the said firm as genuine, when it was false and forged, and suppose he did pretend that he was the lawful agent of said firm, and had authority to make contracts in the name and on behalf of said firm for the sale of said lifting jacks, when, in truth and in fact, he was not such agent and had no authority to contract in the name and on behalf of said firm. The facts assumed to exist wholly fail to show any consideration for the note, or any reason why it was executed. The necessary connection between the false pretenses and the execution of the note could have been shown by an averment that the said Mayfield, by color and by means of said false

pretenses and in reliance upon the same as true, had been induced to purchase from the said Jones, as such agent, the right to sell said machine, for the sum of four hundred dollars, and in consideration thereof, had executed the said note.

It is also claimed by counsel for appellant that the note set out in the indictment is not the one that was obtained by the false pretenses alleged. The facts are these: After Jones had obtained one note from Mayfield, he went back to his house, and upon the ground that such note and contract were written in pale ink, induced Mayfield to surrender up the contract. Thereupon a new note and contract were drawn and executed. They were the same as those surrendered, except written in different and better ink. The execution of the first note was obtained by means of the false pretenses alleged, and the second by means of the first note. The point is not entitled to much consideration. There was no consideration for the second note, except that which supports the first. It was, in substance, one transaction, and the fact that the note set out in the indictment was executed a few hours after the first cannot change its legal character.

We think the pretenses alleged in the indictment were sufficient to deceive a person of ordinary caution and prudence. It is true, that many persons would not have been deceived thereby. They might, by reason of their long experience and greater shrewdness, have detected the fraud, or, having their suspicions excited, they would have communicated to the firm in Cincinnati. But laws are not made for the protection of the shrewd and business man only, but for the entire community. In the enactment of criminal law, the legislature adopts as a standard of intelligence, neither the highest nor the lowest, but the medium. The law only requires the existence of ordinary caution and prudence. Business could not be transacted without placing confidence in the representations of persons engaged therein. While the law does not encourage blind confidence, it does not expect those engaged in the ordinary affairs of life to possess the shrewdness and cunning of the practiced detective. The question therefore is, in such a case as the present, what would a man of ordinary intelligence and caution have done under the facts and circumstances sur-

rounding this transaction? Would such a man have believed and acted upon such pretenses? If he would, the case is made out.

For the failure to allege that Mayfield relied upon such pretenses as true, and upon the faith thereof, purchased from Jones the right to sell such "lifting jack," and in consideration thereof, executed the note set out in the indictment, we must hold the indictment bad.

The judgment is reversed, and the cause remanded, with directions to the court below to sustain the motion to quash the indictment. The clerk will give the proper order for the return of the prisoner to the jail of Jefferson county.

THE PEOPLE v. WILLIAMS.

(4 Hill., 9.)

FALSE PRETENSES.—A representation, though false, is not within the statute, unless calculated to mislead persons of ordinary prudence and caution.

Where, in attempting to defraud another, one is himself defrauded, he cannot complain.

The defendant was convicted for obtaining the signature of Van Guilder to a deed of land, by false pretenses.

The indictment charged the following facts, viz: That Williams, heretofore, etc., at, etc., did falsely pretend to Van Guilder that one Gray was about to sue him, the said Van Guilder, on a bond which he, the said Gray, then held and owned against Van Guilder, and that the said Gray was also about to foreclose a certain mortgage which he then held and owned, and which was a lien upon a farm of Van Guilder, situated, etc., and that he, the said Gray, would take said farm

by such foreclosure away, and deprive the said Van Guilder of the same; and further, that the said Gray had told him, the said Williams, that he was going to sue him, the said Van Guilder, upon said bond, and was going to foreclose the said mortgage. By means of which said false pretenses the said Williams did then and there, unlawfully, obtain the signature of said Van Guilder to a certain written instrument, commonly called a warranty deed, which said instrument bore date, etc., and purported to convey to said Williams all that piece or parcel of land known, etc., [describing it] being the premises upon which the said Van Guilder then resided; with intent then and there to cheat and defraud him, the said Van Guilder. Whereas in truth, etc., said Gray was not about to sue said Van Guilder, on the bond, etc., and was not about to foreclose the said mortgage, etc.; and whereas in truth, etc., the said Gray had not told the said Williams that he was going to sue him, the said Van Guilder, upon said bond, or foreclose the said mortgage, etc.

Per Curiam. It is impossible to sustain this indictment without extending the statute to every false pretense, however absurd or irrational on the face of it. The charge is of falsely representing to Van Guilder that he was about being proceeded against for a debt due from him, and that, by means of the representation, his signature was obtained to a deed of lands. How such a result was made to follow from means apparently so inadequate, we are left to conjecture. Looking to the case made by the indictment, Van Guilder's only ground of complaint would seem to be, that in attempting to defraud another he had himself been defrauded. But whatever the facts are in this particular, there can be no doubt, that an exercise of common prudence and caution on his part, would have enabled him to avoid being imposed upon by the pretenses alleged; and if so, the case is not within the statute. See Goodhall's case, Ry. & Mood. Cr. Cas., 461, 463; Rosc. Cr. Ev., 362.

New trial ordered.

NOTE.—In State v. Crowley, and others, 41 Wis., 271, it appeared that the transaction on the part of the person from whom the money was obtained was *unlawful*, and for that reason it was *held*, there could be no conviction.

In McCord v. The People, 46 N. Y., 470, it is said: "The design of the law is to protect those who for honest purposes are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those who, for unworthy or illegal purposes, part with their goods."

To the same point, see People v. Clough, 17 Wend., 351, and People v. Stetson, 4 Barb., 151.

For cases holding a contrary doctrine to the above, see Com. v. Harris, 22 Pa. St. (10 Harris), 253; also Com. v. Morril, 8 Cush., 571.

STATE v. STANLEY.

(64 Me., 157.)

FALSE PRETENSES.—A pretense that a horse was sound, when the defendent knew that he was not sound, is a false pretense within the statute.

APPLETON, C. J. This is an indictment for cheating one Sullivan by means of certain false pretenses. The allegations in the indictment are, that the defendant, in an exchange of horses with one Sullivan, knowingly, designedly and falsely pretended that his (the respondent's) horse was a sound horse, when, in fact, it was not; that said Sullivan believed said false pretense, and was thereby deceived, and induced to exchange and deliver his horse to the respondent, and was thus defranded.

The question is, whether or not the indictment sets forth a false pretense within Rev. Stat., ch. 126, § 1.

The assertion of the soundness of his horse by the defendant is the assertion of a material fact. It is false. It was made to deceive and defraud. It accomplished its purpose.

This much the demurrer admits. It is not readily perceived why this falsehood is not within the spirit, as well as the letter, of the statute.

In State v. Mills, 17 Me., 211, the owner of a horse represented to another that his horse, which he offered in exchange for the property of the other, was a horse known as "the Charley," when he knew that it was not the horse called by that name, and by such representation obtained the property of the other person in exchange, it was held that the indictment was sustained, although the horse said to be "the Charley" was equal in value to the property received in exchange, and as good as "the Charley." So the statement that the property is unincumbered, when the fact is otherwise, will sustain an indictment for cheating by false pretenses, notwithstanding there may have been a warranty, if the false pretense, and not the warranty, was the inducement which operated upon the party to make the exchange. State v. Dorr, 33 Me., 498. In The People v. Crissie, 4 Denio, 525, an indictment that the defendants falsely pretended to a third person that a drove of sheep, which they offered to sell him, were free of disease and foot-ail, and that a certain lameness, apparent in some of them, was owing to an accidental injury, by means of which they obtained a certain sum of money on the sale of said sheep to such person, with proper qualifying words, and an averment negativing the facts represented, was held good under the statute against cheating by false pretenses. In Rex v. Jackson, 3 Camp., 370, it was held to be an offence to obtain goods by giving a check on a banker with whom the drawer kept no cash. So the representation that a bank check was a good and genuine check, and would be paid on presentation, when the drawer had no funds in the bank on which it is drawn, is a false pretense. Smith v. People, 47 N. Y., 303. So false representations as to quality may constitute a false pretense, for which the person so falsely representing may be indicted. Reg. v. Sherwood, 40 Eng. Com. Law, 585. So by giving false samples, Reg. v. Abbott, Den. C. C., 379. In Reg. v. Kenrick, 48 Eng. Com. Law, 49, the false pretense was that the horses were the property of a private person, and not of a horse dealer, and that they were quiet and tractable, and Lord

DENMAN, C. J., says: "The pretenses were false, and the money was obtained by their means," and the indictment was sustained. In that case the purchaser wanted a quiet and tractable horse; in the one at bar a sound one was wanted. In that case, as in the one at bar, the false representation was effective to defraud.

A false pretense may relate to quality, quantity, nature, or other incident of the article offered for sale, whereby the purchaser, relying on such false representation, is defrauded. Reg. v. Abbott, 61 Eng. Com. Law, 629. A mere false affirmation or expression of an opinion will not render one liable. It must be the false assertion of a material fact, with knowledge of its falsity: Bishop v. Small, 63 Me., 12; Rex v. Reed, 32 Eng. Com. Law, 904. No harm can happen to any one from abstinence in the making of false representations. When made, and material and effective for deception, no sufficient reason is perceived why the guilty party should escape punishment.

Exceptions overruled.

Indictment adjudged good.

DICKERSON, DANFORTH, VIRGIN, PETERS, and LIBBEY, JJ., concurred.

KELLOGG v. STATE.

(26 Ohio St., 15.)

FALSE PRETENSES.—Where the lender of money was induced by false pretenses to make the loan, without expecting that the money loaned would be returned in payment, the offence is obtaining money by false pretenses, and not larceny.

It was proved on the trial, that the witness and the prisoner had first met, and formed a casual acquaintance as passengers

on a train of cars passing from St. Louis to Cincinnati. After their arrival at Cincinnati they again met at the railroad depot, where the prosecuting witness was about to take another train for his home in Madison county, when the following occurrence took place, as detailed by the witness: The defendant asked me if I was going to take that train; I said yes. He said he thought he would go on that train, too. Then a man came up to us, and said to the defendant, "If you want to go on that train, you had better get your baggage, and pay your freight bill." The defendant then said, "Confound these fellows, they won't pay me any premium on my gold, and I have no other money to pay this freight bill, and I don't want to give them two hundred and eighty dollars in gold, and get no premium." He then said to me, "Will you let me have $280 in currency, and I will give you the gold to hold as security, until I can go to the bank and draw some money which I have there, and I will then pay you $280 back." He further said, "I must get my freight out to-night, and they won't let me have it until I pay the bill, which is $280." I then told him I would let him have the two hundred and eighty dollars to pay his freight bill; which I did, and he gave me fourteen pieces of what he said was gold, and which I took for twenty-dollar gold pieces, and I gave him $280 in paper money. He started off, and I examined them, and found that they were not twenty-dollar gold pieces, nor were they gold at all. * * I followed him, but did not overtake him, or see him any more until he was arrested.

On cross-examination, the prosecuting witness testified as follows: "I delivered my money to him voluntarily. He used no force or violence to obtain it from me. I never expected to get the same money again. He said he would go to the bank and draw some money, and come back and pay me what he borrowed and get the gold."

McILVAINE, C. J. On the trial below, the jury were properly instructed that the defendant could not be convicted of larceny, if he obtained the possession of the money alleged to have been stolen from the prosecuting witness with his consent if it was further found that, at the time of the transfer of the possession, the right of property in the money also passed

from the prosecuting witness to the defendant, although the witness was induced, through the fraud of defendant, to part with the possession and the property in the money. And there was no error in the further instruction: "If you find, therefore, that the *mere possession* of the money, with the owner's consent, was fraudulently obtained by the defendant, with intent to steal it from the owner, it is larceny."

This last instruction, however, was the predicate of a proposition which had been given in explanation of the first instruction, to-wit: "While the manual possession of money may be in one person, the legal technical property may still be in another; and a *bailment*, or possession of goods and chattels, obtained by a trick or fraud, does not transfer the property to the person practicing the trick or fraud." Whether this, as an abstract proposition of law, be true or false, it was certainly misleading in the case as it was made in the evidence. The jury could not well have understood it otherwise than as a declaration by the court that the transaction, as detailed by the prosecuting witness, amounted to a mere contract of bailment, which left the right of property remaining in the prosecuting witness.

Now if the common law at all recognizes a class of bailments corresponding to the *mutuum* of the civil law; to-wit, where a loan is made of money, wine, or other things that may be valued by number, weight or measure, which is to be restored only in kind of equal value or quantity, it is not true that the right of property in such bailment remains in the bailor; but on the other hand, the absolute property passes with the possession, and rests with the borrower. In such cases the fraud of the borrower no more prevents the passing of the title to the thing loaned upon delivery, than does fraud on the part of a purchaser of goods. The contract in either case is not void, but only voidable at the election of the lender or seller. The better opinion, however, seems to be that such a loan is not a regular bailment at common law, but falls more properly under the innominate contract, *do ut facies*, and results in a debt, and not in a trust.

The testimony before the jury in the court below tended to prove a loan of money from the prosecuting witness to the de-

fendant, whereby the borrower became indebted to the lender, and assumed to make payment in other money. The testimony of the witness was, that he voluntarily delivered the money to the defendant, and never expected to get the same money again. It is true he was induced to make the loan through the fraud and false pretenses of the defendant. No doubt a crime was thus committed by the defendant, but it was the crime of obtaining money under false pretenses, and not a larceny. To constitute larceny in a case where the owner voluntarily parts with the possession of his property, two other conditions are essential: 1. The owner, at the time of parting with the possession, must expect and intend that the thing delivered will be returned to him, or disposed of under his direction for his benefit; 2, that the person taking the possession must, at the time, intend to deprive the owner of his property in the thing delivered. But where the owner intends to transfer, not the possession only, but also the title to the property, although induced thereto by the fraud and fraudulent pretenses of the taker, the taking and carrying away do not constitute a larceny.

In such case the title rests in the fraudulent taker, and he cannot be convicted of the crime of larceny, for the simple reason that, at the time of the transaction, he did not take and carry away the goods of another person, but the goods of himself.

Had the law been thus stated to the jury, there is no doubt the verdict would have been not guilty, as he stood charged in the indictment.

Judgment reversed, and cause remanded for such further proceeding as may be lawfully had in the premises.

WELCH, WHITE, REX and GILMORE, JJ., concurred.

NOTE.—In State v. Kube, 20 Wis., 217, the defendant obtained from an express agent a package of money, directed to and intended for "Christian Kube," by falsely pretending that it was intended for "Chistiana Kube" his wife. *Held*, that the facts constituted the crime of obtaining money by false pretenses, and not the crime of larceny, the agent having parted with the property *absolutely*, supposing he was delivering it to the husband of the owner.

See, Murphy v. People, Ante p. 157; Loomis v. People, Ante p. 171; Reg. v. Middleton, Ante p. 189.

PEOPLE v. SMITH.

(5 Parker C. R., 490.)

FALSE PRETENSES.—The fact that the false pretenses were made for the purpose of collecting a debt, and that the money obtained was applied as payment thereon, furnishes no defence to a charge of obtaining money by false pretenses.

The case is sufficiently stated in the opinion.

CLERKE, J. For the purpose of determining the question involved in this case, I will assume that Mrs. Stoasser was indebted to Smith in the amount which he obtained from her on the 28th of October, 1862. The question, then, is, if by means of false representations or pretenses, by which a creditor makes his debtor believe that the debtor shall receive a new and valuable consideration, and induces the debtor to part with money therefor—the creditor, at the time he takes the money, intending not to give the new consideration, and, accordingly, never giving the debtor the new consideration, but applying the money, as he intended to apply it at the time he received it, to the payment of the old debt—is he guilty of the legal offence of obtaining property by false pretenses?

The counsel for the accused refers to two cases which would seem to sustain the negative of this proposition: the one, Williams' Case, 7 Car & Payne, 354; the other, The People v. Griffin, 2 Barb. R., 431. The first of these cases was tried at the Brecon Assizes, before Mr. Justice COLERIDGE and a jury. The circumstances were these: A. owed B. a debt, of which B. could not obtain payment. C., a servant of B., went to A.'s

wife and obtained two sacks of malt of her, saying that B. had bought them of A. C. knew this to be false, but took the malt to B., his master, to enable him to pay himself the debt. Mr. Justice COLERIDGE told the jury, if they were satisfied that C. did not intend to defraud A., but only to put it in his master's power to compel him to pay a just debt, it would be their duty to find him guilty. It is not sufficient, he added, that the prisoner knowingly stated that which was false, and thereby obtained the malt; they must be satisfied that the prisoner, at the time, intended to defraud A. The jury rendered a verdict of not guilty. In the other case, to which the counsel of the accused has referred, the defendant was convicted upon an indictment charging him with having written letters to one Heath, threatening to burn and destroy his property, unless he would send the defendant the sum of sixteen dollars, claimed by defendant to be due to him from Heath. The court below thought that the fact of the indebtedness of Heath was entirely immaterial, and so charged the jury. The supreme court, at the Cayuga general term, January, 1848, granted a new trial, holding that the charge was erroneous; Mr. Justice WELLES, in delivering the opinion of a majority of the court, observed: "In order to constitute the offence created by statute, the letters must be sent with a view to extort or gain money or property belonging to another. The intent must be to extort or gain. Can it be truly said that a person extorts money which is justly due?"

Considering the sources from which these decisions have come, they are undoubtedly entitled to respectful consideration. But they appear to me so entirely at variance with the well-known policy of the law, that I cannot regard them as of controlling authority in this case. That policy is, not to give any man the right of self-redress, except in the well-known instances of self-defence, recaption or reprisals, entry on lands and tenements, when another person has, without any right, taken possession thereof, and abatement of nuisances. In the two instances of self-redress, which relates to the repossession of property, the law limits the right only to cases where it can be exercised without force or terror, or any breach of the peace. Otherwise, this right would be inconsistent with the peace and

good order of society, which it is one of the principal purposes of the law to encourage and support. If every man were allowed to redress himself by force and violence, society would fall back into that condition which characterized it before it emerged from the barbarism of the dark and middle ages, when every man and every family undertook to avenge themselves, and the land "was filled with violence." Instead of the peaceful administration of justice by impartial tribunals, feuds and factions, transmitted from generation to generation, would obstruct all industry, and render any progress in wealth, refinement, or the arts of life, impossible. In the same way, and for reasons equally important, the law discourages the employment of fraud or falsehood in the endeavor to obtain redress. Although there are some duties, such as truth, which are termed duties of imperfect obligation, which the law does not undertake to enforce, yet it will never encourage the violation of any of these duties by sanctioning their violation, even in the endeavor to accomplish a lawful end. This would be legalizing the profligate doctrine that the end sanctifies the means—a doctrine not only abhorrent to conscience and the Divine law, but at variance with the principles of municipal law, of which the object is, not only to preserve society from open violence, but to discountenance everything that is calculated to encourage strife and dishonesty in the intercourse of men with each other. If it is wise to forbid men from using force to collect a debt, it is equally wise to forbid them from using fraud to collect it. If strife is not the immediate consequence of the latter, it will, if generally sanctioned, lead to it. It will, at all events, inevitably breed imposture and falsehood, which are quite as pernicious to the best and highest interests of society as violence. Besides, is it to be taken for granted that debtors have no rights? Is it enough for a man to say that another is his debtor? The latter may, as, indeed, in the case before us, have a defence to the claim, the sufficiency of which can be properly determined only by the tribunals appointed by law to ascertain the truth. It would be unjust, by sanctioning a trick, to deprive an alleged debtor of the attitude in which he stands, and allow his alleged creditor to recover his demand without requiring him to prove it where

it is disputed, and giving the former an opportunity of substantiating his defence.

This is the result which such a practice would undoubtedly produce; and though injured creditors may, by such means, occasionally obtain their rights, many debtors would be deprived of their rights. So that where it is said, in the case above quoted, that "the defendant's object was not to cheat or defraud, but to get that which was honestly his due," this is not the question, but the proper consideration is, is it safe to allow every man to be a judge in his own cause, and, in officiating in that capacity, to allow him to resort to false pretenses to accomplish his purpose? If a person having, or pretending to have, a claim against another, is allowed to do what in any other case would render him liable to punishment for obtaining goods under false pretenses, why should he not also be allowed to do what, if he had not such a claim, would render him liable to punishment for the crime of larceny. Would the law, for instance, recognize his rights to take money furtively out of the desk of his alleged debtor, and apply it to the payment of his debt? He has the opportunity, without force, of doing this, and in the language employed by the court, in The People v. Griffin, "his object is not to cheat or defraud, but to get that which is honestly his due." The intent would be precisely the same as in the case before us, and the only difference would be, that in the one case he obtained money by means which the law, in ordinary cases, calls false pretenses, while in the case I have been supposing, he would obtain it by means which the law, in ordinary cases, calls larceny. But I think he would be convicted of larceny in this supposed case.

The case of The People v. Thomas, 3 Hill R., 169, though going very far, does not sustain the principle asserted by the counsel for the accused. In that case there was a misrepresentation as to the loss or destruction of the note. The note was due, and the maker was willing and ready to pay it. On paying his money he knew that it was to be appropriated to the payment of the note. He was not induced by the misrepresentation to give it for any other purpose, on the promise that he was to get another consideration for it. It did not appear from the indictment that Jones sustained any damages by the false

representations. The case turned upon the sufficiency of the indictment. Whether the maker of the note would or would not be injured by any subsequent disposition of the note was purely speculative.

I think the recorder fairly and clearly presented the true question to the jury, and properly refused to charge as the prisoner's counsel requested.

The objections taken to the indictment and the rulings on the evidence are equally untenable.

The conviction should be affirmed, and the sessions directed to proceed to judgment.

Justice BARNARD concurred.

NOTE.—SUTHERLAND, P. J., filed a dissenting opinion, in which he said: "If, when the money was obtained, the prisoner intended to apply it on a just debt, due to him from her, can it be said that he intened to *cheat or defraud her* out of the money? I think not. To complete the statutory crime, the means, the pretenses or representations must not only be false and made designedly, but they must also be made with a particular intent to-wit, to cheat or defraud another."

THE STATE v. THATCHER.

(35 N. J., 445.)

FALSE PRETENSES.—The offence may be charged either in the words of the act, or there may be such a particular statement of fact as will bring the accused within its operation.

It is no defence to an indictment for obtaining property by false pretenses, that the defendant is able to return such property.

It is not necessary that the false pretenses should have been the *sole inducing influence* which moved the prosecutor to part with his property.

Obtaining a note or contract by false pretenses is within the statute.

The indictment charges the defendant with having obtained of one Lovi Case, the prosecutor, his signature as surety on two promissory notes, payable to John M. Wilson, or bearer, for $500 each, by falsely representing to the prosecutor, with intent to defraud him, that he, the defendant, had paid off and satisfied two notes of prior date, on which said Case was his security, when, in fact, said last mentioned notes were not paid, but were still outstanding, and Case was subsequently compelled to pay them.

The defendant was convicted at the September Term of 1870, of the Hunterdon Oyer and Terminer, and after trial and verdict the court suspended judgment, that the advisory opinion of this court might be taken, as to whether judgment should be arrested or a new trial granted.

The court charged the jury "that by force of our statute it was a misdemeanor if the defendant obtained by false pretenses, the signature of the prosecutor to the negotiable note in question, with intent to put such note in circulation, and actually did put it in circulation; and that it did not affect the case if the defendant, at the time of procuring said signature, intended to pay the note at maturity."

And the court refused to charge the following proposition for the defendant:—

1. That the variance between the false pretense averred and that proved is fatal, and the defendant should be acquitted, the allegation being that "Thatcher said he had paid off the notes," while the proof was "he said they were paid off."

2. That to sustain the indictment it was necessary for the prosecutor to swear that the false pretense induced him to sign, and that he would not have signed but for it.

The question reserved for the advisory opinion of the court, whether judgment should be arrested or a new trial granted, were argued before Beasley, Chief Justice, and Justices Scudder and Van Syckel.

For the state, Mr. Besson and Mr. Van Fleet.

For defendant, Mr. Allen and Mr. Shipman.

VAN SYCKEL, J: The correctness of the proposition, that

everything necessary to maintain the indictment must be set forth, and that the facts must be proved substantially as laid, will not be questioned.

It is a general rule that in indictments for misdemeanors created by positive law, the offence may be charged either in the words of the statute, or they may be such a particular statement of facts as will bring the accused within its operation. United States v. Lancaster, 2 McLean, 431; People v. Taylor, 3 Denio, 91.

The averment here is that the defendant, with the design and intent to cheat and defraud Case of a valuable thing, did falsely pretend, knowing such pretense to be false, that the two notes were paid, and that Case was wholly discharged from liability thereon, and by means of such false pretense did procure said Case to become surety on two other notes, whereas in truth, the prior notes were unpaid and outstanding, and said Case was obliged afterwards to pay them.

Conceding that a person who obtains the signature of another as such surety by the false pretenses is amenable to the pains of the enactment, what essential element of the statutory offence is omitted in this indictment?

The intent to cheat specifically charged, and the false pretense by which the guilty intent ripened into a criminal act is expressly stated.

It is insisted that if the defendant was solvent at the time, and able to pay, no guilty intent could have existed in his mind, and that the want of an averment that he was insolvent, and that the prosecutor had not collected, and could not collect from him, the amount which he had paid, is fatal.

It is not of the essence of the misdemeanor that the defendant should be unable to restore that which he wrongfully obtains. If, by a false pretense, he had procured the loan of $500 in bank notes, his ability to refund the money could not shield him, and it would not be necessary to aver his inability to repay.

The crime denounced is the obtaining by false pretenses.

By the cheat the prosecutor was moved to part with the thing of value, and was thereby placed in a position of jeopardy which he would not otherwise have occupied. The fraudulent intent was fully manifested in aiding the prosecutor to

assume a legal liability which subjected him to the contingency of loss.

The defendant's ability, or his ultimate intention, to do what the law would compel him, as the principal debtor, to do, cannot save him.

The charge in the indictment is, that the defendant falsely stated that the two notes had been fully paid and satisfied by him, and that Case was discharged from liability thereon; and the proof to sustain this allegation is, that the defendant said they were all paid off. Could it truthfully be said that they were paid off if they had been taken up by some third person, and were still outstanding as valid obligations?

If they were paid off they must have been paid off by him, or by some one for him, so that he was fully apprised, by the indictment, of the facts as they were proved.

In The People v. Herrick, 13 Wend., 90, the variance was held to be immaterial where the indictment charged that the false representations were that the defendant had deposited $300 with one Squier, whereas the proof was that he said he had deposited $150.

It is not necessary that the pretense should have been the sole cause which moved the prosecutor to lend his name. The influences which operate on the mind in most cases are numerous and concurrent. In this case, friendship for the defendant, and a desire to aid him in his business, operated influentially; in the case of a merchant, who is induced to part with his goods, the hope of gain would be very potential. In fact it could not often happen that the prosecutor's mind would yield to the false pretense exclusively, and that no other motive would impel it in the same direction.

It is sufficient, if the jury are satisfied that the unlawful purpose would not have been affected without the influence of the false pretense, added to any other circumstances which might have contributed to control the will of the injured party.

This question was fairly submitted to the jury; and, although the prosecutor did not expressly testify that the false pretense induced him to give his name, his testimony fully warranted the jury in finding that to be the fact. The authorities on this subject will be found collected in a note, section three

hundred and seventy-five of the second volume of Bishop's Criminal Law.

The main question in the case is, whether our statute is impotent to punish the obtaining by false pretenses of a contract of suretyship.

The note in this case, and the paper upon which it was written, belonged to the defendant; the prosecutor merely signed his name as surety, and returned the note to the defendant. Was this signature a valuable thing within the meaning of the fifty-second section of our act respecting crimes?

This question has been discussed in cases of larceny, where the thing stolen must be of some value to the prosecutor. In Clark's case, Russell & Ryan's C. C., 181, the defendant was indicted under 2 George II., ch. 25, for stealing reissuable notes, the property of Large & Son, while in the course of transmission to them after they had been paid. It was held that the drawers could not have any valuable property in their own notes, and the prisoner was convicted only of the larceny of the paper and stamps on which they were written.

In Phipoe's case, 2 East P. C., 599, some of the judges held that the prosecutor's own note could not be said to be of any value to him; others thought it was of value from the moment it was drawn; but that it never was in the possession of the prosecutor, and that it was obtained by duress, and not by larceny.

In Walsh's case, Russell & Ryan C. C., 215, the prisoner was charged with stealing a check drawn by the prosecutor, and the objection that the stolen instrument was of no value to the prosecutor, in his own hands, prevailed, and the defendant was acquitted.

In Vyse's case, 1 Moody C. C., 218, who was convicted for receiving reissuable notes, knowing them to be stolen, the conviction was sustained. Some of the judges doubted whether the notes were valuable securities, but all agreed that if they were not, they were goods and chattels.

In Aickle's case, 2 East P. C., 675, the conviction was for the larceny of a bill of exchange drawn by the prosecutor, and accepted by another.

In Rex v. Metcalf, 1 Moody C. C., 433, this point was directly adjudicated. The defendant, having been convicted of the larceny of a check drawn by the prosecutor, the judge was induced, by a reference to Walshe's case, to reserve for the opinion of the judges the question whether the check in the hands of the drawer was of any value to him, and could be the subject of larceny. Lord DEMAN, C. J., TINDAL, C. J., and COLERIDGE affirmed the conviction, Justice LITTLEDALE alone doubting. And in Heath's case, 2 Moody C. C., 33, which was, in all respects like the one last cited, the authority in Metcalf's case acknowledged without a dissenting opinion. The supreme court of Alabama, State v. Wilson, 1 Porter, 118, ruled, that the prosecutor's own note was not the subject of larceny. In reaching this conclusion, Phipoe's case was relied upon by the court, no reference having been made to the later cases of Metcalf and Heath.

In the People v. Loomis, 4 Denio, 380, where the defendant was tried for the larceny of a receipt, Justice BEARDSLEY said, "that although a receipt was the subject of larceny under the New York statute, it must be made effective by being issued or delivered before it can become a valuable private instrument. It must be, when stolen, an evidence of some right in action, or an instrument by which a right or title to real or personal property was in some manner effected."

Though a receipt differs essentially from a promissory note, which becomes effective in the hands of a *bona fide* holder without notice, yet it must be admitted that a receipt did affect some demand or right of the complainant. In the hands of the defendant it was *prima facie* evidence that the obligation recited in it was discharged; and it shifted the burden of proof, and it carried with it this operation from the very moment it was wrongfully taken.

In Rex v. Danger, Dearsley & Bell's C. C., 307, a case more directly in point, it was held that Danger could not be convicted under 7 and 8 George IV., ch. 29, for inducing the prosecutor, by false pretenses, to write an acceptance on a piece mercantile paper. It was not questioned in this case that the acceptance of another person would have been a valuable security within the meaning of that act, but Lord CAMPBELL said:

"The thing obtained must have been the property of some one other than the prisoner. Here there is great difficulty in saying that, as against the prisoner, the prosecutor had any property in the document as a security. While it was in the hands of the prosecutor it was of no value to him."

In 9 Wend., 182, Stone was charged with false pretenses, in obtaining the indorsement of one Filley to a promissory note. The words of the New York statute. are "money, goods, or chattels, or other effects whatsoever." The offence was committed before the passage of the act making it indictable to obtain, by false pretenses, the signature of any person to a written instrument. The court, Justice SUTHERLAND delivering the opinion, held that the words "other effects whatsoever" were as comprehensive as the words "whatever kind of valuable property," in the 52nd George III., and that the obtaining from the maker his own note was punishable, if the defendant subsequently passed the note and made it productive. The only doubt was, whether an indictment would lie where no use had been made of the security.

In the People v. Genung, 11 Wend., 19, the same judge held that the effect of the latter statute was to make the crime complete as soon as the signature was obtained.

In this state of judicial decision, we are free to adopt such construction of our statute as will best conform to sound rules of interpretation. The rule of strict interpretation for criminal statutes does not hinder the court from searching for the legislative will; nor is the rule violated by giving words, in some cases, their full or the more extended of two meanings, as the wider popular, instead of the narrower technical one.

Cases are not wanting where some elasticity has been given to criminal statutes, in order to extend them to the mischief obviously aimed at. Thus a jail has been held to be an inhabited dwelling-house, within the statute respecting arson. People v. Cotteral, 18 Johns., 115, and the English statute, 7 George II., ch. 22, against the forging of a warrant for the payment of money, was not restricted in its interpretation to commercial transactions, but extended to an order drawn by a justice of the peace on a high constable, to pay a reward. Rex v. Graham, 2 East P. C., 945.

In England courts have been very astute, and justly so, *in favorem vitæ*, in their interpretation of criminal statutes; but, in this country, the tendency is to relax this strictness and refinement as inapplicable to cases of mere misdemeanor, and offences not capital. The course of legislation on this subject shows an intention to bring within the reach of the statute every kind of property.

The English statute of 30 George II., ch. 24, which used the words "goods, wares, and merchandise," was found defective in not providing against choses in action by false pretenses. This defect was remedied by 7 and 8 George IV., ch. 29, which used the words "any chattels, money, or valuable security."

Our legislators, who framed our act in view of the early English statutes, were not content with the language there used, but, with the design of amplifying its operation, employed the words, "money, wares, merchandise, or other valuable thing." Our statute, having been passed prior to 7 and 8 George IV., and our law-makers having adopted more comprehensive terms than that act contains, no argument can be drawn from the fact that the English Parliament, by subsequent enactment, declared it indictable to obtain by false pretense the signature of any person to a written instrument. "Valuable thing" is more comprehensive than "valuable security." Every valuable security is a valuable thing, but many valuable things are not valuable securities. Mere tangible things were not alone meant, for the words prior to valuable things described them.

The legislature intended to denounce as a crime the obtaining by deceit of every valuable thing of a personal nature. "Other valuable things" includes everything of value. That it embraces the promissory note of a third person is settled in State v. Tomlin, 5 Dutcher, 13.

Is the maker's own note or contract of suretyship a valuable thing? The signing of the name was an act; the name, when signed, was a thing. Was it a thing of any value? While it remained locked up in his secretary, it was of no value to the maker, but *eo instanti* it passed out of his hands by the fraud; it became impressed with the qualities of commercial paper,

and possessed to him the value which it might cost him to redeem it from a *bona fide* holder. The moment Case delivered these signatures, he assumed a liability to pay $1,000, contingent upon their being negotiated. Can it, therefore, be said that a paper, which imposed such a risk, was of no value to the maker? Its value to him consisted not in what it would put in his pocket if he retained it, but in what might be taken out of his purse by the delivery of it to the defendant.

This view was evidently taken in the Commonweath v. Rand, 7 Metcalf, 475, which was a case of larceny of bank notes which had been redeemed by the bank, in which Chief Justice SHAW said: "The bank was the owner of the paper, which was of some value to be reissued; but a consideration of more importance is, that notwithstanding the bills were stolen, yet, on being passed to a *bona fide* holder, the bank would be bound to pay them as if they had not been redeemed. The injury to the bank, therefore, is the same."

Under the contrary view, the fraud-doer, instead of obtaining from his victim, by false pretenses, his bank notes, may defy the law, by resorting to the simple device of getting his check and drawing the money at bank, or he may practice deception with impunity upon a bank by drawing their own circulating notes. Under our humane system of criminal law, judicial ingenuity should not exhaust its resources to reach an interpretation in favor of the wrong.

In common and legal understanding, the language of our act is broad enough to comprehend the maker's own negotiable note or contract of suretyship, by which a piece of paper, before worthless, is stamped with an exchangeable value. The policy of the law applying with equal force to such securities, there is no rule of interpretation which forbids us to carry the enactment to the extent of the mischief.

The suggestion that, since the practice of endorsing commercial paper has become so frequent, it will lead to dangerous results to hold this to be an indictable offence, is not entitled to much consideration, in view of the fact that there has hitherto been no abuse of the law in its applicaton to the numberless daily transactions in the community, which are unquestionably within its terms.

In my opinion, the court below should be advised to deny a new trial.

The Chief Justice and Justice SCUDDER concurred.

NOTE.—In People v. Miller, 2 Parker C. R., 197, the defendant was charged with having obtained the prosecutor's endorsement to a note by false pretenses. Upon the trial the prosecutor was permitted to state, as a witness, what influence the representations of the defendant had upon him, by way of inducing him to endorse the note. *Held*, that the evidence was properly received.

In re Snyder, 17 Kan., 542, it was *held*, that it was not necessary to show that the owner had been induced to part with his property *solely* and *entirely* by pretenses which were false; that it was sufficient, if they were part of the *moving cause*, and, without them, the defrauded party would not have parted with the property.

In State v. Kube, 20 Wis., 217, the rule that false pretenses must be such as are calculated to deceive a person of ordinary prudence and discretion, was followed, and also, that it must appear that it was solely by means of them that the fraud was consummated.

See People v. Haynes, ante p. 333.

In Com. v. Coe, 115 Mass., 481, it was *held*, no defence to an indictment for obtaining money by false pretenses, that the prisoner intended to repay it, and was able to do so.

REG. v. HAZELTON.

(13 Cox C. C., 7.)

FALSE PRETENSES.—Where goods were fraudulently obtained by giving for them in payment, as cash, checks on some banks where the prisoner had only trifling sums, and on others where his account was overdrawn, he falsely pretending that he then had money in the banks to the amount of the sums mentioned in the checks, and that he had authority to draw the checks on the banks; and that the checks were good and valid orders for the payment of the amount thereof. *Held*, that the above evidence was sufficient to support the false pretenses that he had authority to draw the checks, and that they were good and valid orders for the payment of the amount thereof.

Case reserved for the opinion of this court by Common Sergeant of London.

At the October sessions of the Central Criminal Court, William Hazelton was tried on an indictment for obtaining goods by false pretenses.

First count. That the defendant, on the 4th of April, 1874, did unlawfully and knowingly, falsely pretend to Robert Young and another, that he then had money to the amount of £5 in a certain bank called the Biskbeck Bank, at Nos. 29 and 30, Southampton Buildings, Chancery Lane, in the county of Middlesex. That he then had authority to draw a check upon that bank for the sum of £5; and that a certain paper writing, which he then produced and delivered to the said Robert Young and another then, was a good and valid order for the payment of money, to wit, for £5, and that by means of those false pretenses he unlawfully and fraudulently obtained from them thirty-three shirts, with intent to defraud.

Second count. Obtaining from the same persons, on the 7th of April, forty shirts, by exactly similar false pretenses, in respect of a check for £8 8s., given by him.

Third count. Obtaining, on the 29th of August, a pair of boots from Edward Sayer and another, by falsely pretending to them that he then kept a banking account with the Islington Branch of the London and County Bank; that he then had money to the amount of £2 9s. in that bank; that he then had authority to draw a check upon that bank for £2 9s., and that a certain paper writing, which he then produced and delivered to the said Sayer and another, was then a good and valid order for the payment of £2 9s.

Fourth count. Obtaining from the Wood Street Warehouse Company, six dresses called costumes, on the 31st of August, by falsely pretending to them that he then kept a banking account with the Islington Branch of the National Provincial Bank of England. That he then had money to the amount of £3 9s. in that bank. That he then had authority to draw a check upon that bank for £3 9s.; and that a certain paper writing, which he then produced and delivered to the Company then, was a good and valid order for the payment of £3 9s.

Fifth count. Obtaining on the 1st of September, from the

said Wood Street Warehouse Company, thirteen dresses called costumes, and nineteen petticoats, by exactly similar false pretenses to those in the fourth count, in respect of a check for £9 11s. 6d., which he then gave them in payment.

Sixth count. Obtaining on the 1st of September, from W. Marshall Candy and another, thirteen shawls, by exactly similar false pretenses, in respect of a check for £2 14s. 2d., which he then gave in payment.

Seventh count. Obtaining on the 2d of September, from the said Wood Street Warehouse Company, 112 petticoats, by exactly similar false pretenses, in respect of a check for £19 6s. 1d., which he then gave in payment.

Eighth count. Obtaining on the 2d of September, from the said W. M. Candy and another, 126 shawls, by exactly similar false pretenses, in respect of a check for £22 11s. 6d., which he then gave in payment.

It was proved in evidence that the prisoner opened an account at the Birkbeck Bank on the 30th of June, 1873, with a payment to his credit of £22 10s., and had a check book given to him for his use containing fifty blank checks. That on the 9th of December, 1873, the balance in his favor in the Birkbeck bank was 5s. 3d., and that the account remained unaltered up to the 27th of June, 1874, when he applied to the Birkbeck Bank for a new check book, which they refused, and then he withdrew 5s. He could have had the 3d. That thirty-three of his checks were honored, and about seventeen refused, by the Birkbeck Bank. That he would not have been allowed to overdraw his account at the Birkbeck Bank.

It was also proved that the prisoner opened an account at the Islington Branch of the London and County Bank, on the 2d of June, 1874, with a payment to his credit of £27, and had a check book given to him containing twenty-five checks. That on the 6th of July following, a balance of 7s. 4d. stood there to his credit. That on the 23d of August following the account was, by accident, allowed to be overdrawn; and that transaction was the last. His checks on that bank afterwards presented and dishonored.

It was also proved that, on the 8th of July last, the prisoner opened an account at the Islington Branch of the National

Provincial Bank of England, with a payment to his credit of £30, and had a check book given to him containing twenty-four checks. He drew out £25 by a check in favor of Mrs. Hazelton, and on the 23d of July his account was overdrawn by 22s. On the 24th of July notice in writing was given to him by the bank that his account was overdrawn, and requesting his attention to it. The account was unaltered until the 3d of September, when he paid in £2 15s. and £15 5s., leaving £16 18s. to his credit. On the next day, 4th of September, the sum £14 16s. was drawn out by a check in favor of his wife, leaving £2 2s. to his credit. Seven of his checks, altogether, were paid, of which five were in favor of his wife, Mrs. Hazelton. Some others of his checks were presented and dishonored.

The following evidence was also adduced:

On the 2d of April, 1872, the prisoner went to Messrs. Young and Rochester's, and ordered over two dozen shirts, and called again for them about two o'clock in the afternoon of the 4th, and said he wished to pay ready money; and an invoice was made out, and discount deducted from the invoice, making the sum of £7 5s., and the prisoner gave a check on the Birkbeck Bank for £5, and paid the balance of £2 5s. in cash.

The 4th of April was Saturday, the 5th was Sunday, and the 6th was a bank holiday, so that the prisoner's check could not be presented for payment until the 7th. Early in the morning of the 7th, before ten o'clock, A. M., the prisoner went again to Young & Rochester's, and ordered other goods to the amount of £8 8s., and said he wished to pay ready money, and discount was allowed to him. He gave his check on the Birkbeck Bank for the amount, and took away the goods.

Both the above checks were presented to and dishonored by the Birkbeck Bank.

Some of the above goods were pawned by the prisoner, in the name of Williams, on the 13th and 17th of April, for £1 6s., with a pawnbroker who knew him well for two or three years before, in that name, and who said his dealings were satisfactory, and that the goods pawned by him were usually re-

deemed; but at the time of the trial before me that pawnbroker had £35 worth of goods in pawn by the prisoner.

Other of the above goods were pawned by prisoner on the 30th of April, 15th of August, and 9th of September, with another pawnbroker, to whom prisoner was known for two years, and who said that he usually redeemed the goods pawned.

Other of the same goods were pawned with another pawnbroker, to whom prisoner was known, and who said that he, in all cases, redeemed the goods pawned by him; but that he, the pawnbroker, had, at the time of the said trial before me, goods to the amount of £12 in pawn by the prisoner.

On Saturday, August 29, last, the prisoner went to Messrs. Sayer & Healey's, and bought for ready money, with discount, two pairs of boots for £2 9s., and gave his check for that sum on the London and County Bank, Islington, which was dishonored on presentment on the 31st of August. He afterwards returned one pair of the boots, saying that they were too heavy for him.

On September 1st, last, the prisoner went to Messrs. Candy & Co., and bought as a cash transaction, with discount, thirteen shawls, in payment for which he gave his check for £2 14s. 2d. on the Islington Branch of the National Provincial Bank of England; and on the 2d of September last, at 5.30 P. M., he again went to Candy's, and saying that he had sold some of his previous day's purchase from them, he bought as a cash transaction, with discount, ten and one-half dozens of shawls, in payment for which he gave his check on the same bank for £22 11s. 6d. Both these checks were dishonored, and the greater portion of the shawls were pawned by the prisoner on the 3d of September, and afterwards redeemed and repawned with pawnbrokers to whom he was well known.

On the 31st of August, and on the 1st and 2d of September last, the prisoner went to the Wood Street Warehouse Company, and bought, on each occasion as cash transactions, certain dresses and skirts, and took them away with him, and gave in payment on those days, respectively, three checks on the Islington Branch of the National Provincial Bank for £3 9s., £9 11s. 6d., and £19 6s. 1d., each of which was dishonored.

On the 3d of September he pawned 103 of the skirts with a pawnbroker, to whom he was known, for £13 10s.

The prisoner, after the dishonor of the foregoing checks, said to the several holders that he had been disappointed in his expectations of receiving money, and that he would take up the check in a few days.

Evidence was also given of the dishonor of about twelve other checks drawn and given by the prisoner in payment for other goods bought by him, and of his unperformed promises, after dishonor, to the holders of the checks to take them up.

A detective police officer proved that he went to prisoner's house on the 15th of September, and got in at the back through the garden; that the prisoner tried to escape, but was apprehended. He was told he was taken for obtaining goods from Candy's, and he replied: "It's debt, not a fraud, and you can't make a fraud of it." Being asked if he had any duplicates in the house, he said, "No." The officer found, however, on search, 185 duplicates and pawnbrokers' contract notes, representing together pawnings and deposits to the amount of about £330. The officer also found invoices from various firms, and the prisoner's check books on the three above-mentioned banks, and his pass book of the Birkbeck Bank. Scarcely a single article of furniture was found in the house, but amongst the duplicates found were some for household furniture pawned by the prisoner.

It appeared, therefore, by the evidence, that at the time he gave in payment the two checks on the Birkbeck Bank for £5 and £8 8s. mentioned in the first and second counts, the prisoner's account there was still an open one, but the balance in that bank to his credit was 5s. 3d. only, and that his check for sums exceeding that balance were dishonored, and he would not have been allowed to overdraw.

That at the time he gave in payment the check for £2 9s. on the London and County Bank, mentioned in the third count, his account there was overdrawn, and his check on that bank had been dishonored.

That at the time he gave in payment the checks for £3 9s., £9 11s. 6d., £2 14s. 2d., 19s., 16s. 1d., and £22 11s. 6d., on the Islington Branch of the National Provincial Bank, mentioned

in the fourth, fifth, sixth, seventh, and eighth counts, his account there was overdrawn, and he had notice of it; that his account remained overdrawn from the 23d of July to the 3d of September, when he paid in £18, and on the 4th of September drew out £14 16s. for his own use, leaving two guineas to his credit, subject to the payment thereout of some small charges. His checks, mentioned in the indictment, on the bank, were dishonored.

It also clearly appeared that many of the prisoner's checks, other than those mentioned in the indictment, on the beforementioned banks, had been and were afterwards dishonored.

I doubted, upon the decided cases, whether, in point of law, a man who gives a check in payment, under the circumstances before mentioned, does by the mere fact of giving the check, without saying more than that he wishes to pay ready money, makes either of the false pretenses alleged in the indictment, viz., first, that he then has money to the amount of the check in the bank upon which it is drawn; secondly, that he then has authority to draw upon the bank for that sum; thirdly, that the check which he gives is a good and valid order for the payment of its amount; fourthly, that he then has a banking account with the bank upon which his check is drawn, and where his account is overdrawn.

I summed up the case to the jury, and they found that the prisoner did not intend, when he gave the respective checks mentioned in the indictment, to meet them, and that he intended to defraud.

A verdict of guilty was thereupon recorded, and I abstained from passing judgment, and reserved for the opinion of the court, for consideration of crown cases reserved, the question whether there was any evidence to go to the jury of the prisoner having made any of the false pretenses mentioned in the indictment? If there was, the conviction is to be confirmed. If there was not, it is to be reversed.

THOMAS CHAMBERS,
Common Sergeant of London.

No counsel appeared to argue for the prisoner.

BESLEY, for the prosecution. The conviction is right. The jury have found that the prisoner did not intend, when he gave

the several checks, to meet them, and that he intended to defraud. LUSH, J. It can hardly be maintained that a person, by giving a check, conveys the representation that he has, at the moment of giving it, funds to the amount of it in the bank. Each case depends on its own circumstances. In this case, the prisoner knew that the checks would not be met. In Rex v. Jackson, 3 Camp., 371, BALEY, J., said: "The point had been recently before the judges, and they were all of opinion that it is an indictable offence fraudulently to obtain goods by giving in payment a check upon a bank with whom the party keeps no cash, and which he knows will not be paid." BRETT, J. There is no doubt here of the fraudulent intent. The question is, whether the prisoner made a fraudulent representation. The indictment alleges that the prisoner falsely represented that he then had authority to draw a check upon the bank, and also that the check was a good and valid order for the payment of money. The giving of the checks fraudulently proves those representations. In Reg. v. Giles, 34 L. J., 53, M. C., BLACKBURN, J., says: "It is not requisite that the false pretense should be made in express words, if the idea is conveyed." POLLOCK, C. B. You may contend that the giving of the check was a representation that it would be honored when presented, whereas he well knew that it would not. Certainly; for the prisoner, when he gave the check, said that he wanted to pay cash, and so obtained a discount. In Lockett's case, Leach C. C., 53, it was held that a forged draft on a banker was an order for the payment of money. In Reg. v. Parker, 2 Moo. C. C., 1, 7 Car. & P., 825, the majority of the judges held that a count, which charged that the prisoner pretended that a certain paper writing which he then produced, and was as follows, setting out a check, was a good and genuine order for payment of the sum of, etc., was proved by the following facts: The prisoner went and bought a watch of the prosecutor, and gave in payment of it a post-dated check on a bank where he had no funds, falsely representing to the prosecutor that he had an account with the bankers on whom the check was drawn, and that he had a right to draw the check, though he postponed the date for his own convenience. So, in the present case, the prisoner fraudulently represented in each trans-

action that he wished to pay ready money, and gave the checks. It is submitted, therefore, that the second and third false pretenses charged were substantially proved.

Kelly, C. B. I am of opinion that the conviction must be affirmed. Two questions arise in the case. The first is, whether, on the facts and documents proved, the prisoner has expressly or impliedly, fraudulently made the representations on which the goods were obtained; the second, whether any one of the representations alleged is a false pretense within the statute. The indictment alleged three false representations. First, that the prisoner falsely pretended that he then had money to a certain amount in the bank; secondly, that he then had authority to draw a check upon the bank for that amount; thirdly, that a certain paper writing was a good and valid order for the payment of that amount. If the case had rested upon the first pretense alone, there would have been considerable difficulty in supporting the conviction, because there are many cases in which no such representation can be implied from the mere giving of a check, as a general rule, for persons of undoubted substance and respectability often draw checks exceeding the balance to their credit at their bankers, and which are paid by their bankers. We may, therefore, put that representation out of the case. The second alleged pretense is, that the prisoner then had authority to draw a check upon the bank for the amount. That is an important representation, and arises when a man gives a check in payment for goods, or in satisfaction of any other demand; and I think that false representation was proved in this case. But if there is any doubt about the case, it is removed when we look at the third pretense, that the paper writing produced by the prisoner was a good and valid order for the payment of the sum therein mentioned. The case of Reg. v. Parker expressly decides that this is a false pretense within the statute. Then comes the main question: is it to be implied from the fact proved that the prisoner made all or any of these false representations? As regards the second and third false pretenses, it is perfectly clear that the prisoner knew at the time when he gave the checks that he had no authority to draw checks

for the amounts specified therein, and that he well knew that they would not be paid. Those false pretenses were, therefore, proved, and the conviction must be affirmed.

LUSH, J. I am of the same opinion. I also think that the mere giving of a check does not convey a representation that the drawer has money to the amount of the check in the banker's hands, at the time of giving it. Many persons give checks exceeding their balance at the bank at the time, in the expectation of their being able to pay in money to meet them before they are presented. In this case the prisoner ordered and obtained goods, saying he wished to pay ready money; invoices were made out and discounts deducted, and prisoner gave checks for the amount. I think that amounted to a representation that the checks were equivalent to cash, and, therefore, that the false pretense that the checks were good and valid orders for the payment of money was proved.

BRETT, J. I am of the same opinion. The learned common sergeant in this case doubted, upon the decided cases, whether in point of law a man who gives a check in payment, under the circumstances before mentioned, does by the mere fact of giving the check, without saying more than that he wishes to pay ready money, makes either of the false pretenses alleged in the indictment. The question reserved for us is, therefore, pointed to that part of the necessary proof on the trial of an indictment for false pretenses, the proof of a false representation of a fact which, if it had not been false, would have been an existing fact. The common sergeant has pointed to the fact on which he wants the opinion of this court. Now the meaning of a representation to another person cannot depend upon the state of mind of the person making the representation, but must depend on what idea he conveys to the mind of the other person. It is common knowledge that persons have authority from a bank to draw checks to a considerable amount, when they have no money at the bank. I am of opinion, therefore, that the mere giving of a check does not convey a representation that the drawer has money at the bank. Then, as to the second false representation, that the prisoner

had authority to draw upon the bank for the amount in the checks. Now, if the giving of a banker's check does not mean that, what does it mean? Then, as to the third false representation, but for the case of Rex v. Parker, I should have doubted whether the mere giving of a check was a representation of an existing fact, that the check was a good and valid order for the payment of money.

QUAIN, J. I am of the same opinion. I think that the giving of the checks in this case amounts to a representation that they were good and valid orders for the payment of the sums therein mentioned, on the authority of Rex v. Parker, which was decided by a majority of the judges. The only difference in the facts is, that the prisoner in that case had no funds at all at the bank, whereas in this he had a few shillings.

POLLOCK, B. I am also of opinion that this conviction should be affirmed. I think that there was evidence that the prisoner made the false representations thirdly charged, that the checks when given were good and valid orders for the payment of the sums specified therein.

Conviction affirmed.

NOTE.—In Smith v. People, 47 N. Y., 303, it was charged, that the defendant, with intent feloniously to cheat and defraud one Stark, did knowingly, etc., represent to him that a certain instrument in writing for the payment of money, commonly called a *bank check*, which he then and there delivered to him, purporting to have been drawn by one Smith, upon the Ocean Bank of the city of New York, for the sum of $140, was a good and genuine check, and that he, plaintiff in error, had money on deposit in said bank, and said check would be paid on presentation, the said Stark then and there believing the said false pretenses so made and used, as aforesaid, by the said Smith.

GROVER, J., said: "The only question is upon the indictment as to the sufficiency of the representations to bring the case within the statute. They clearly are. The substance is, that the money was on deposit in the bank for the payment of the check upon presentation, in the usual course of business, and that the check was, therefore, a good and available security to Stark for the payment of the purchase-money for the cigars, then sold and delivered by Stark to him, in reliance upon these representations."

STATE v. JONES.

(70 N. C., 75.)

FALSE PRETENSES.—Deceiving an agent in the execution of his appropriate business, which he is employed to transact, is the same as deceiving the principal.

The indictment charges that the defendant, intending to cheat and defraud one Collins, unlawfully, knowingly, etc., sold him four barrels of light wood chips, billets of wool, and dirt, covered on top with turpentine, for four barrels of merchantable turpentine, for which he obtained ten dollars.

It appeared that defendant carried it to the store of Collins, at the time in the keeping of his son, twelve years old, and proposed to sell him the four barrels of turpentine, stating that it was all right; that he, the son, "need not examine it, but might take his word for it that it was good at the bottom of the barrels as it was at the top;" that when the barrels were emptied, they were found to contain a small quantity of turpentine, the rest light wood chips, and dirt.

The defendant's counsel asked the court to charge:

"That unless the agent of Collins informed him of the alleged false pretenses before he, the agent, delivered the goods to the defendant, the jury cannot convict;

That if the jury think that the prosecutor had the means of detection at hand, and did not use it, the jury cannot convict;

That if the jury think that there was a warranty, and that the prosecutor relied upon that warranty, they cannot convict;

That the jury must believe that the prosecutor relied upon

the false pretenses, believing them to be true, or they cannot convict;

That it is for the jury to say, whether or not, the prosecutor had the means at hand to detect the fraud."

All of which instructions the court refused to give, and charged the jury, that "if the defendant knowingly and intentionally offered for sale and did sell, as charged in the indictment, the turpentine, as merchantable, hard or scraped turpentine, knowing the same to be fraudulently mixed with chips, etc., he is guilty; that the deceiving an agent in the execution of his appropriate business, which he is employed to transact, is the same as deceiving the principal; and that if the jury are satisfied from the evidence that the defendant was the active agent in the transaction, and that he is guilty of unmistakable and intentional fraud and deception, then they are to return a verdict of guilty."

The jury found the defendant guilty. Defendant appealed from a judgment rendered upon the verdict.

SETTLE, J. The doctrine of *caveat emptor*, upon which the defendant relies, does not apply to the facts in the case before us.

After the very thorough discussion of the crime of cheating by false tokens, pretenses, etc., and the citation of authorities, by READE, J., in State v. Phifer, 65 N. C. Rep., 321, it would be useless to pursue the subject further.

The facts in the case fall clearly under the denomination of our statute. Rev. Code, ch. 34, sec. 67. And notwithstanding the objections urged by counsel to the charge of his honor, we are of opinion that he submitted the case to the jury in as favorable a light to the defendant as he had a right to expect.

There is no error.

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Phalen's Criminal cases : being a selection of authorities upon the subjects of embezzlement, false pretenses, larceny, robbery, etc., with comments, notes and references.

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